From:	Harke, Eileen
To:	Carrie Hyde-Michaels; Teri Jackson-Hicks
Cc:	Carey Galst
Subject:	Compiling Contemporaneous Decision Files - Follow-up on Outreach to FOIA/Records Staff (DTS#068090)
Date:	Tuesday, September 4, 2018 4:53:18 PM
Attachments:	068090 Signed Memorandum w attachments.pdf

Carrie and Teri -

We just wanted to follow up on the Compiling Contemporaneous Decision File Memo that was signed and sent out via DTS on May 11, 2018. While it went to many people through the normal DTS distribution, we are concerned that it may not have been actually disseminated to all staff, especially to those staff serving in FOIA/Records positions.

Carey asked me to alert you to this concern and ask if you might consider adding it as an agenda item at an upcoming FOIA Coordinator's meeting and eERDMS/Records meeting.

Thank you for considering this request.

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~~~~~~~~~~~~~~~~~~~~~~~~~~

United States Department of the Interior

FISH AND WILDLIFE SERVICE

MAY 1 1 2018

In Reply Refer To:
FWS/AES/DAES/DER/068090

Memorandum

To: Service Directorate

From: Principal Deputy Director

Subject: Compiling Contemporaneous Decision Files

This memorandum provides direction regarding the contemporaneous compilation of Decision Files to document Agency review and decision making pursuant to the National Environmental Policy Act (NEPA; April 27, 2018, Deputy Secretary's memorandum). These procedures apply to Decision Files for Agency decisions other than notice-and-comment rulemaking, which have their own prescribed processes.

In accordance with 282 FW 5, *Compiling a Decision File and an Administrative Record*, all Service programs will adhere to the following standardized process as outlined in the policy. Managers are to establish a program manager, project manager or designated staff member who will assist in coordinating and consulting with other people in the Service and the Department to gather responsive information related to the development of a decision.
All files are to be reviewed (including electronic files) related to the decision and decision-making process.

Compilation of decisional files should be a proactive part of our decision-making process; not just a reactive response to a FOIA or litigation. Compiling decisional files as the records are being created ensures a complete and accessible record. To facilitate this process, staff should use labels in Bison Connect e-mail and utilize designated locations for electronic and paper documents related to a particular decision. As staff compile the records associated with each Agency decision, they should refer the annual FISSA+ and records management guidance to determine which files should be considered a record and maintained as part of the decisional file for this particular Agency decision.

To ensure the Service collects all responsive documents, the program lead may request an Enterprise eArchive System (EES) Audit Request. For further information, contact Service Records Officer, Ms. Teri Jackson-Hicks at teri_jackson-hicks@fws.gov or phone (703) 358-2257.

We will continue to work with the Division of Information Resources and Technology Management to streamline the process and update applicable policies.

Attachments

THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

APR 2 7 2018

Memorandum

To: Assistant Secretaries
Heads of Bureaus and Offices
NEPA Practitioners

From: Deputy Secretary

Subject: Compiling Contemporaneous Decision Files

Purpose:

This Memorandum provides direction regarding the contemporaneous compilation of Decision Files to document Agency review and decision making pursuant to the National Environmental Policy Act (NEPA) and other applicable requirements.[1]

Background:

On August 31, 2017, I issued Secretary's Order 3355 (Order) to immediately improve the Department of the Interior's (Department) NEPA process. In the course of implementing that Order, it has come to my attention that some Bureaus do not compile Decision Files contemporaneously with the development of Agency decisions. This yields a need to invest significant time and resources later if the Bureau is asked to compile records before or following a decision.

The Department has multiple responsibilities for the maintenance and disclosure of Federal records. For purposes of this Memorandum, document compilation responsibilities fall into three general categories that often intersect, including: (1) records management governed by 44 U.S.C. Chapters 29 and 31; (2) the Freedom of Information Act (FOIA);[2] and (3) preparation of Administrative Records for litigation.

A Decision File is a contemporaneous record of the Agency's decision-making process. Practically, the Decision File is a collection of documents maintained by a designated employee who is generally the project's program manager, the project manager, or staff who has access to the relevant documents that detail the development of an Agency's decision. Compilation of a Decision File should flow from an already established practice within the Bureaus and Offices to comply with the Federal Records Act (FRA).[3]

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[1] These procedures apply to Decision Files for Agency decisions other than notice-and-comment rulemaking, which have their own proscribed processes.
[2] 5 U.S.C. § 552.
[3] 44 U.S.C. § 31 et seq.

The FRA dictates the need to document, and preserve evidence of, Agency decisions. It requires the head of each Federal Agency to make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the Agency for the purpose of furnishing the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the Agency's activities.[4] By adhering to the FRA, Bureaus and Offices will find themselves well placed to create a Decision File in real time.

If the decision is subjected to judicial review, the Decision File will be used as the primary basis for compilation of the Administrative Record to be submitted to a court. This Memorandum does *not* address the standards for compiling an Administrative Record, which may be a subset of the Decision File document or, in some cases, could be broader. The Decision File may also serve as the primary compilation of documents that may be responsive to a FOIA or other records request, although additional document gathering may be needed depending upon the nature of the request.

Directives:

1. No later than May 11, 2018, each Bureau shall issue direction requiring contemporaneous compilation of Decision Files for decision-making processes that will or could result in a "final Agency action" subject to challenge under the Administrative Procedure Act.[5] Each Bureau shall further establish a system for standardized Decision File tracking to comply with this Memorandum and that comports with the needs of the Office of the Solicitor, the Office of Environmental Policy and Compliance, and the Office of the Chief Information Officer.

2. The Decision File should:

    - Contain the complete story of the Agency decision-making process, including options considered and rejected by the Agency;
    - Include important substantive information that was presented to, relied on, or reasonably available to the decision maker;
    - Establish that the Agency complied with relevant statutory, regulatory, and Agency requirements; and
    - Demonstrate that the Agency followed a reasoned decision-making process.

3. Bureaus and Offices have wide latitude to create and maintain Decision Files, but the following general guidelines should be followed:

[4] 44 U.S.C. § 3101.
[5] 5 U.S.C. § 704.

- The Office of the Solicitor should be consulted throughout the process as necessary;

- A Decision File should be created once consideration of a proposal, application, request, or decision begins, which will vary based on the situation;

- The Decision File should serve as a single organized source of information that records the Agency decision and decision-making process;

- As a routine matter, the Decision Files should capture information from employees who are involved in the decision-making process prior to those employees leaving such roles;

- The Decision File should be kept in an accessible location and should be organized in a logical manner, such as chronologically or by topic—or even chronologically within each topic—so that documents can be added to the Decision File as they are generated or received;

- To the extent documents may be subject to a privilege, they should be so marked to the extent practicable during the decision-making process;

- All documents placed in the Decision File should be appropriately labeled and dated;

- Substantive meetings that are relevant to the decision-making process should be sufficiently documented;

- Drafts that help substantiate the Agency's decision-making process should be included in the Decision File;

- Documentation of electronic information (such as that found on websites) and communications (such as emails) should be maintained in the Decision File only if relevant, substantive, and if it documents the decision-making process;

- When information contained on websites is relied on, the Decision File should contain a contemporaneous copy of the website, including the address and date it was downloaded, to ensure that the information relied on is preserved before the website content changes;

- Contemporaneous memoranda that document relevant oral communications, serve to explain otherwise confusing emails, or that document other matters that demonstrate the Agency's decision-making process should be written or collected and placed in the Decision File before the final decision is reached; and

- Once the decision maker has made a final decision, the Decision File should be closed.

4. Bureaus and Offices are directed to provide a copy of the direction referenced in section 3 – paragraph 1 to the Office of the Deputy Secretary at nepa.depsec@ios.doi.gov no later than May 15, 2018.

Effective Date:

Directives and guidance within this Memorandum are effective immediately upon distribution.

282 FW 5

Compiling a Decision File and an Administrative Record

Supersedes Director's Order 158, 09/04/03
Date: March 2, 2007
Series: Records Management
Part 282: Records Management Program
Originating Office: Division of Policy and Directives Management

PDF Version

5.1 What is the purpose of this chapter? This chapter steps down and supplements the Department of the Interior's guidance for compiling decision files and administrative records.

5.2 What is the scope of this chapter? All Service employees who are responsible for Service decisions and establishing an administrative record must follow the guidance in Exhibit 1, Memorandum from the Department of the Interior Office of the Solicitor to the Director, Standardized Guidance on Compiling a Decision File and an Administrative Record, June 27, 2006.

5.3 What is the authority for this chapter? The authority for this chapter is the Administrative Procedure Act (5 U.S.C. 552).

5.4 What is a decision file and why is it important?

A. A decision file:

(1) Is compiled and maintained by an employee during the decisionmaking process. Typically, the employee who compiles the file is the program manager, project manager, or a designated staff member who has access to the relevant documents used to make and detail the development of a decision.

(2) Contains the complete "story" of our decisionmaking process.

(3) Includes important, substantive information that people involved in the decision used, relied on, or that was reasonably available or presented to them when making the decision.

(4) Makes it easier for employees to compile the administrative record if we need to do so.

(5) Establishes that we complied with relevant statutory, regulatory, and agency requirements.

(6) Demonstrates that we followed a reasoned, decisionmaking process.

(7) May also be called a case, action, agency, official, or issue file.

B. Following are examples of a few, but not all, actions for which employees should keep decision files:

(1) Permit decisions.

(2) Listing and critical habitat decisions.

(3) Drafting and amending regulations.

(4) Policy decisions.

(5) Freedom of Information Act requests.

(6) Adverse personnel actions.

(7) Land acquisition decisions.

5.5 What is an administrative record?

A. If a Service decision is challenged in court, the court may ask us to provide an administrative record.

B. We must begin to prepare the administrative record by using the decision file.

C. The administrative record:

(1) Is the paper trail that documents the Service's decisionmaking process and the basis for any final Service decision.

(2) Is the documentation used to support Service decisions and to reveal the reason for both the decision and the decisionmaking process.

(3) Documents not only the decisions and involvement of employees, but also the decisions of contractors and involvement by outside parties related to Service decisionmaking.

5.6 Why is an administrative record important? These are the records that a judge reviews to determine if our final decision is legally sufficient and supportable. An incomplete record may:

A. Improperly or incorrectly skew our final decision about an issue,

B. Invite litigation after the decision,

C. Affect our ability to defend the decision if we are challenged in court, and

D. Call into question accuracy of the decision and the decisionmaking process.

5.7 How does the Service determine what documents to include in the administrative record? We:

A. Follow the guidance in Exhibit 1. The guidance gives specific examples of what to include in the record.

B. Work with the Solicitors Office to determine what statutes and regulations apply to the administrative record. Though the Administrative Procedure Act generally applies to all Service decisionmaking, there may be specific records requirements in authorizing statutes that also impact the process. You should become familiar with the records requirements in any statute that affects the

decision that your administrative record documents. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and the Clean Air Act (42 U.S.C. 7607) both have specific records requirements for decisions made under those statutes.

C. Coordinate and consult with other people in the Service and the Department. If asked to prepare an administrative record, contact all other Service and Department employees involved in the decisionmaking process and ask them to search all files (including electronic files) related to the decision and decisionmaking process, including, but not limited to:

(1) Central program files,

(2) Working files kept at their desks,

(3) Calendars,

(4) Documents they received as courtesy copies,

(5) Handwritten notes,

(6) Electronic mail, and

(7) Any other record of electronic communications related to the decision.

5.8 What types of records should be in the administrative record?

A. All records (see section 5.7C) that people involved in the decision used or that were available to them when they were making the decision.

B. Records that relate to the substance or procedure of making the decision (see pages 6-7 of Exhibit 1 for examples).

C. All pertinent records regardless of whether they favor the decision that we made, favor alternatives other than the decision made, or express criticism of the decision. Never withhold records just because they may not support the decision.

5.9 May Service employees remove pertinent records from the administrative record? No, employees must include all records related to the decisionmaking process. Before submitting the administrative record to a court and after getting approval from the Office of the Solicitor and the Department of Justice attorney assigned to the case, the Service or Regional Records Officer may remove or redact records on the basis of privilege.

A. The removal or redaction of records on the basis of a privilege may be challenged, and the court may determine whether the removal or redaction is appropriate (for example, a judge may perform an ‘in camera’ or ‘in chambers’ inspection in his or her office to determine if the records should be removed or redacted).

B. The Service or Regional Records Officer or Regional Solicitor must document the removal or redaction of records**.** Attach a list of any records removed or redacted on the basis of privilege. At a minimum, the list should include:

(1) Document number,

(2) The name of the document and a brief description,

(3) Number of pages

(4) Author(s),

(5) Date, and

(6) Privilege (if one is claimed).

5.10 What types of records are generally not included in the administrative record? We generally do not include (also see Exhibit 1, pages 8-10):

A. Records that are not relevant to the decisionmaking process, such as fax cover sheets (unless the fax cover sheets, for example, contain substantive (opinions/actions) related to the decisionmaking).

B. Documents that were not in our possession at the time we made the decision.

C. Electronic communications, including emails, that do not contain factual information or information that documents the decisionmaking process.

D. Personal notes, journals, and appointment calendars maintained solely for personal use and not circulated to colleagues or added to the agency file.

E. Drafts of documents where the differences among them reflect minor editing changes. Minor editing changes are changes that do not substantively affect the meaning, decision, or intent of any record that is part of the decisionmaking process. However, you must include drafts that have hand-written notes showing the evolving decisionmaking process.

5.11 Who certifies the administrative record? The certifier signs a statement, under penalty of perjury, swearing to the authenticity and completeness of the record (see Appendix 3 of the Department's guidance in Exhibit 1). The Service Records Officer certifies the administrative record for Headquarters programs involved in litigation. For programs involved in litigation in the Regions, the Regional Records Officer or the employee who is most familiar with how we prepared the administrative record certifies the record. Employees may contact the Service Records Officer with questions about who should certify the record for cases in their Regions.

5.12 What is required for the certification of the administrative record presented to the court? Those doing the review and certification of the administrative record should be given adequate time to review the record. The program should provide the following to the person certifying the administrative record for the court:

A. A copy of all individual records that compose the administrative record.

B. A copy of the index of the administrative record.

C. A list of any documents withheld on the basis of privilege or removed because they are not pertinent to the record (see section 5.9B).

5.13 What is the potential outcome of an improperly prepared administrative record? As mentioned in section 5.6, in the event of litigation an incomplete administrative record may cause the court to grant a plaintiff's motion to supplement the record and/or overturn the Service's decision. The court may do so for the following reasons:

A. The record does not adequately explain our action.

B. There is evidence that we failed to consider all relevant material.

C. We considered evidence that we did not include in the record.

D. The case is very complex and the court needs additional information to understand the decision.

E. The case involves a failure to take action.

F. The case involves a preliminary injunction where the court may relieve the plaintiff from some action or penalty because the record does not support it.

5.14 Who should Service employees contact if they have questions? If you have a question about administrative record requirements, contact the Service Records Officer, the Solicitor's Office that serves your Region, or your Regional Litigation Coordinator.

For information on the content of this chapter, contact the Service Records Officer in the Division of Policy and Directives Management (PDM). For more information about this Website, contact Krista Holloway in PDM at Krista_Holloway@fws.gov.

From:	Willey, Seth
To:	Melanie Ruiz
Subject:	Fwd: Skinny Administrative Record/FOIA Guidance
Date:	Thursday, September 6, 2018 11:47:57 AM
Attachments:	ENRD Memo - Administrative Record (October 20, 2017).pdf Foreseeable Harm Memo final_Cafaro.pdf Haugrud email.pdf 20180906_FOIA and Skinny AR guidance.docx

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In your regular job role, are you the right person to send this out? Should it go to all of our folks ?

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Seth L. Willey
Acting ARD, Ecological Services
Southwest Region, USFWS
Seth_Willey@fws.gov
Work: 505-248-6492
Cell: 505-697-7600

****

---------- Forwarded message ----------
From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 10:37 AM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, "Long, Michael" <michael_long@fws.gov>, "Merritt, Timothy" <timothy_merritt@fws.gov>, "Aubrey, Craig" <craig_aubrey@fws.gov>, "Frazer, Gary" <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey

Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division ("ENRD") wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice ("DOJ"), which addresses the scope of the administrative record in Administrative Procedure Act ("APA") record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ's view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency's predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled "Guidance to the Federal Agencies in Compiling the Administrative Record," should be disregarded.[1] This updated guidance is specifically

[1] Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ's long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA[1] generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.[2] Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

[1] 5 U.S.C. § 552.
[2] See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.[3]

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.[4] Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.[5] See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL.*

- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.

- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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[3] "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See 383 DM 15 § 15.6.H.

[4] See *43 C.F.R. § 2.23(c)* (requiring bureaus to consult with SOL before withholding a record in full or in part).

[5] All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See 383 DM 15 § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

	CHART 1	
If	**Then**	**And**
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL
		After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.

- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.[6] The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.

- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.[7] If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.[8] Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

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[6] For example, these statutes have been found to be covered by Exemption 3.

[7] For more information on Exemption 4, see Exemption 4 in a Nutshell.

[8] This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law[9], however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.[10]

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials[11] that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

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[9] It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

[10] Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

[11] If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uniformed decisionmaking, and public confusion.[12]

- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

	CHART 2	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

[12] For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

	CHART 2 (CONT.)	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at https://www.doi.gov/foia/contacts and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	**Generally Protects this Type of Information**	**If this Exemption Applies then Conduct**
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis

Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov> Tue, Nov 7, 2017 at 7:57 AM
To: Carey Galst <Carey_Galst@fws.gov>

I'm thinking this is actually in place now, b5-DPP, b5-ACP [redacted]

Parks Gilbert
ESA Litigation Specialist
Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
703/358-1758
parks_gilbert@fws.gov

---------- Forwarded message ----------
From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

---------- Forwarded message ----------
From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-DPP, b5-ACP [redacted]

--

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3 attachments

ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior's Departmental FOIA Officer, addressing the "Foreseeable Harm Standard," (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, "…injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion." The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, "…the lawyer would no longer be kept fully informed by their [*sic*] client, resulting in unsound legal advice and advocacy." Further, the foreseeable harm arising from releasing attorney work product may include, "…harm to the adversarial trial process by exposing the attorney's preparation to scrutiny." Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys' advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office's FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
    - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
    - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
    - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):

    - Draft outlines, conceptual treatments, etc.;
    - Draft inserts of language for team consideration or inclusion in policy/rule;
    - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
    - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
    - Internal comments from other Service offices and regions;
    - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
    - PowerPoints/webinars not shared with audiences external to the federal government;
    - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
    - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
    - Internal briefing documents that address pre-decisional substantive issues;
    - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.

- Categories of information and documents that are typically released in full:

    - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
    - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
    - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
- Subject lines and attachment names, unless they reveal content that reflects substantive information;
- Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
- PowerPoints/webinars that have been shared with non-federal audiences;
- Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
- Decision memoranda that reflect the final decision and rationale of the agency; and
- Final memoranda communicated to OMB Directors.

- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:

    - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
    - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
    - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

From:	Jacobsen, Susan
To:	Melanie Ruiz
Cc:	Seth Willey
Subject:	Fwd: Skinny Administrative Record/FOIA Guidance
Date:	Thursday, September 6, 2018 11:48:25 AM
Attachments:	ENRD Memo - Administrative Record (October 20, 2017).pdf Foreseeable Harm Memo final_Cafaro.pdf Haugrud email.pdf 20180906_FOIA and Skinny AR guidance.docx

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Hi Mel, hot off the press below. Bridget asked on the chiefs call this am that we distribute it within the region.

---------- Forwarded message ----------
From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 10:37 AM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, "Long, Michael" <michael_long@fws.gov>, "Merritt, Timothy" <timothy_merritt@fws.gov>, "Aubrey, Craig" <craig_aubrey@fws.gov>, "Frazer, Gary" <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163

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Susan Jacobsen
Division Chief, Classification and Restoration
Ecological Services, Southwest Region

U.S. Fish and Wildlife Service
P.O. Box 1306, Albuquerque, NM 87103-1306
505-248-6641; mobile 505-206-9845

For information on ESA Improvements/Species Status Assessments (SSAs) check out this link:
https://www fws.gov/endangered/improving_esa/ssa html

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division ("ENRD") wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice ("DOJ"), which addresses the scope of the administrative record in Administrative Procedure Act ("APA") record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ's view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency's predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled "Guidance to the Federal Agencies in Compiling the Administrative Record," should be disregarded.[1] This updated guidance is specifically

[1] Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ's long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA[1] generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.[2] Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

[1] 5 U.S.C. § 552.
[2] See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.[3]

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.[4] Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.[5] See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL.*

- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.

- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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[3] "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See 383 DM 15 § 15.6.H.

[4] See *43 C.F.R. § 2.23(c)* (requiring bureaus to consult with SOL before withholding a record in full or in part).

[5] All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See 383 DM 15 § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

	CHART 1	
If	**Then**	**And**
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL
		After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.

- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.[6] The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.

- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.[7] If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.[8] Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

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[6] For example, these statutes have been found to be covered by Exemption 3.

[7] For more information on Exemption 4, see Exemption 4 in a Nutshell.

[8] This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law[9], however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.[10]

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials[11] that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

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[9] It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

[10] Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

[11] If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uniformed decisionmaking, and public confusion.[12]

- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

	CHART 2	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

[12] For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

	CHART 2 (CONT.)	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at https://www.doi.gov/foia/contacts and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	**Generally Protects this Type of Information**	**If this Exemption Applies then Conduct**
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis

Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov> Tue, Nov 7, 2017 at 7:57 AM
To: Carey Galst <Carey_Galst@fws.gov>

I'm thinking this is actually in place now, b5-DPP, b5-ACP [redacted]

Parks Gilbert
ESA Litigation Specialist
Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
703/358-1758
parks_gilbert@fws.gov

---------- Forwarded message ---------
From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

---------- Forwarded message ---------
From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-DPP, b5-ACP [redacted]

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3 attachments

ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior's Departmental FOIA Officer, addressing the "Foreseeable Harm Standard," (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, "…injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion." The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, "…the lawyer would no longer be kept fully informed by their [*sic*] client, resulting in unsound legal advice and advocacy." Further, the foreseeable harm arising from releasing attorney work product may include, "…harm to the adversarial trial process by exposing the attorney's preparation to scrutiny." Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys' advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office's FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
    - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
    - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
    - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):

    - Draft outlines, conceptual treatments, etc.;
    - Draft inserts of language for team consideration or inclusion in policy/rule;
    - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
    - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
    - Internal comments from other Service offices and regions;
    - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
    - PowerPoints/webinars not shared with audiences external to the federal government;
    - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
    - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
    - Internal briefing documents that address pre-decisional substantive issues;
    - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.

- Categories of information and documents that are typically released in full:

    - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
    - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
    - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
- Subject lines and attachment names, unless they reveal content that reflects substantive information;
- Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
- PowerPoints/webinars that have been shared with non-federal audiences;
- Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
- Decision memoranda that reflect the final decision and rationale of the agency; and
- Final memoranda communicated to OMB Directors.

- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:

    - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
    - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
    - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

From:	Gilbert, Parks
To:	Husen, Russell
Subject:	Fwd: Skinny Administrative Record/FOIA Guidance
Date:	Thursday, September 6, 2018 12:58:14 PM
Attachments:	ENRD Memo - Administrative Record (October 20, 2017).pdf Foreseeable Harm Memo final_Cafaro.pdf Haugrud email.pdf 20180906_FOIA and Skinny AR guidance.docx

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Hey Russ,

We finally finished this guidance. If you want to share it with IA now, I think that's OK. I have no idea whether Carrie Hyde-Michaels plans to implement it Service-wide; that's totally up to her. Oh, and I already sent it to some of your colleagues for their information.

Thanks,

Parks

Parks Gilbert
Endangered Species Act Litigation Specialist
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---------- Forwarded message ---------
From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 12:37 PM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, Long, Michael <michael_long@fws.gov>, Merritt, Timothy <timothy_merritt@fws.gov>, Aubrey, Craig <craig_aubrey@fws.gov>, Frazer, Gary <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division ("ENRD") wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice ("DOJ"), which addresses the scope of the administrative record in Administrative Procedure Act ("APA") record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ's view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency's predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled "Guidance to the Federal Agencies in Compiling the Administrative Record," should be disregarded.[1] This updated guidance is specifically

[1] Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ's long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA[1] generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.[2] Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

[1] 5 U.S.C. § 552.
[2] See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.[3]

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.[4] Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.[5] See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL.*

- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.

- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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[3] "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See 383 DM 15 § 15.6.H.

[4] See *43 C.F.R. § 2.23(c)* (requiring bureaus to consult with SOL before withholding a record in full or in part).

[5] All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See 383 DM 15 § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

	CHART 1	
If	**Then**	**And**
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL
		After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.

- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.[6] The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.

- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.[7] If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.[8] Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

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[6] For example, these statutes have been found to be covered by Exemption 3.

[7] For more information on Exemption 4, see Exemption 4 in a Nutshell.

[8] This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law[9], however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.[10]

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials[11] that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

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[9] It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

[10] Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

[11] If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uniformed decisionmaking, and public confusion.[12]

- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

	CHART 2	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

[12] For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

	CHART 2 (CONT.)	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at https://www.doi.gov/foia/contacts and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	**Generally Protects this Type of Information**	**If this Exemption Applies then Conduct**
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis

Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov> Tue, Nov 7, 2017 at 7:57 AM
To: Carey Galst <Carey_Galst@fws.gov>

I'm thinking this is actually in place now, b5-ACC & DP [redacted]

Parks Gilbert
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---------- Forwarded message ---------
From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

---------- Forwarded message ---------
From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-ACC & DP [redacted]

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3 attachments

ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior's Departmental FOIA Officer, addressing the "Foreseeable Harm Standard," (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, "…injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion." The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, "…the lawyer would no longer be kept fully informed by their [*sic*] client, resulting in unsound legal advice and advocacy." Further, the foreseeable harm arising from releasing attorney work product may include, "…harm to the adversarial trial process by exposing the attorney's preparation to scrutiny." Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys' advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office's FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
    - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
    - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
    - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):

    - Draft outlines, conceptual treatments, etc.;
    - Draft inserts of language for team consideration or inclusion in policy/rule;
    - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
    - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
    - Internal comments from other Service offices and regions;
    - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
    - PowerPoints/webinars not shared with audiences external to the federal government;
    - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
    - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
    - Internal briefing documents that address pre-decisional substantive issues;
    - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.

- Categories of information and documents that are typically released in full:

    - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
    - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
    - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
- Subject lines and attachment names, unless they reveal content that reflects substantive information;
- Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
- PowerPoints/webinars that have been shared with non-federal audiences;
- Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
- Decision memoranda that reflect the final decision and rationale of the agency; and
- Final memoranda communicated to OMB Directors.

- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:

    - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
    - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
    - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

From:	Chen, Linus
To:	Daniel Pollak - NOAA Federal
Cc:	Parks Gilbert
Subject:	Fwd: Skinny Administrative Record/FOIA Guidance
Date:	Thursday, September 6, 2018 2:54:10 PM
Attachments:	ENRD Memo - Administrative Record (October 20, 2017).pdf Foreseeable Harm Memo final_Cafaro.pdf Haugrud email.pdf 20180906_FOIA and Skinny AR guidance.docx

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Hi Dan,

FWS just distributed their guidance on applying the deliberative process privilege in FOIA responses. As I believe NOAA is trying to determine how to respond to the DOJ memo on Administrative Records, we thought this may be of help. FWS requests that NOAA GC keep a close hold of this, and not to distribute it. If you have anything you can share with FWS on your end, it would be greatly appreciated.

Thanks,

Linus

---------- Forwarded message ---------
From: **Gilbert, Parks** <parks_gilbert@fws.gov>
Date: Thu, Sep 6, 2018 at 12:43 PM
Subject: Fwd: Skinny Administrative Record/FOIA Guidance

Hey all, here is the long-awaited (at least on my branch's part) skinny AR/FOIA guidance. Please reach out with any questions.

Thanks,

Parks

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
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---------- Forwarded message ---------
From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 12:37 PM
Subject: Skinny Administrative Record/FOIA GuidanceH

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy

and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163

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U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
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Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division ("ENRD") wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice ("DOJ"), which addresses the scope of the administrative record in Administrative Procedure Act ("APA") record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ's view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency's predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled "Guidance to the Federal Agencies in Compiling the Administrative Record," should be disregarded.[1] This updated guidance is specifically

[1] Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ's long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA[1] generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.[2] Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

[1] 5 U.S.C. § 552.
[2] See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.[3]

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.[4] Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.[5] See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL.*

- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.

- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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[3] "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See 383 DM 15 § 15.6.H.

[4] See *43 C.F.R. § 2.23(c)* (requiring bureaus to consult with SOL before withholding a record in full or in part).

[5] All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See 383 DM 15 § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

	CHART 1	
If	**Then**	**And**
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL
		After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.

- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.[6] The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.

- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.[7] If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.[8] Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

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[6] For example, these statutes have been found to be covered by Exemption 3.

[7] For more information on Exemption 4, see Exemption 4 in a Nutshell.

[8] This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law[9], however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.[10]

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials[11] that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

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[9] It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

[10] Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

[11] If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uniformed decisionmaking, and public confusion.[12]

- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

	CHART 2	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

[12] For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

	CHART 2 (CONT.)	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at https://www.doi.gov/foia/contacts and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	**Generally Protects this Type of Information**	**If this Exemption Applies then Conduct**
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis

Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov> Tue, Nov 7, 2017 at 7:57 AM
To: Carey Galst <Carey_Galst@fws.gov>

I'm thinking this is actually in place now, b5-DPP, b5-ACP [redacted]

Parks Gilbert
ESA Litigation Specialist
Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
703/358-1758
parks_gilbert@fws.gov

---------- Forwarded message ---------
From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

---------- Forwarded message ---------
From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-ACC & DP [redacted]

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

--

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3 attachments

ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior's Departmental FOIA Officer, addressing the "Foreseeable Harm Standard," (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, "…injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion." The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, "…the lawyer would no longer be kept fully informed by their [*sic*] client, resulting in unsound legal advice and advocacy." Further, the foreseeable harm arising from releasing attorney work product may include, "…harm to the adversarial trial process by exposing the attorney's preparation to scrutiny." Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys' advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office's FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
    - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
    - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
    - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):

    - Draft outlines, conceptual treatments, etc.;
    - Draft inserts of language for team consideration or inclusion in policy/rule;
    - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
    - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
    - Internal comments from other Service offices and regions;
    - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
    - PowerPoints/webinars not shared with audiences external to the federal government;
    - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
    - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
    - Internal briefing documents that address pre-decisional substantive issues;
    - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.

- Categories of information and documents that are typically released in full:

    - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
    - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
    - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
- Subject lines and attachment names, unless they reveal content that reflects substantive information;
- Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
- PowerPoints/webinars that have been shared with non-federal audiences;
- Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
- Decision memoranda that reflect the final decision and rationale of the agency; and
- Final memoranda communicated to OMB Directors.

- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:

    - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
    - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
    - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

From: Ruiz, Melanie
To: Seth Willey
Cc: Susan Jacobsen
Subject: Re: Skinny Administrative Record/FOIA Guidance
Date: Thursday, September 6, 2018 3:13:20 PM

Yes, I'll send it out to PL plus.

Melanie Ruiz
[Acting Deputy ARD-ES, Sept-Oct 2018]
Chief, Branch of Litigation/FOIA
USFWS-Southwest Region
Division of Ecological Services
Office: 505-248-6284
Cell: 505-259-0335

On Thu, Sep 6, 2018 at 11:47 AM Willey, Seth <seth_willey@fws.gov> wrote:

> In your regular job role, are you the right person to send this out? Should it go to all of our folks ?
>
> **********
> Seth L. Willey
> Acting ARD, Ecological Services
> Southwest Region, USFWS
> Seth_Willey@fws.gov
> Work: 505-248-6492
> Cell: 505-697-7600
> **********
>
> ---------- Forwarded message ----------
> From: **Fahey, Bridget** <bridget_fahey@fws.gov>
> Date: Thu, Sep 6, 2018 at 10:37 AM
> Subject: Skinny Administrative Record/FOIA Guidance
> To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, "Long, Michael" <michael_long@fws.gov>, "Merritt, Timothy" <timothy_merritt@fws.gov>, "Aubrey, Craig" <craig_aubrey@fws.gov>, "Frazer, Gary" <gary_frazer@fws.gov>
> Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>
>
> Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA

Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163

From:	Ruiz, Melanie
To:	FW2
Cc:	Lisa Krabbe; Katie Rutledge; David Tischer; Chantay Jennings; sandra_coneyjames
Subject:	Fwd: Skinny Administrative Record/FOIA Guidance
Date:	Thursday, September 6, 2018 3:17:03 PM
Attachments:	ENRD Memo - Administrative Record (October 20, 2017).pdf Foreseeable Harm Memo final_Cafaro.pdf Haugrud email.pdf 20180906_FOIA and Skinny AR guidance.docx

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See below for guidance on applying the deliberative process privilege to FOIA in light of "skinny" AR direction from DOJ. Please contact me or any member of the FOIA Team with questions.

Thank you,
Melanie

Melanie Ruiz
[Acting Deputy ARD-ES, Sept-Oct 2018]
Chief, Branch of Litigation/FOIA
USFWS-Southwest Region
Division of Ecological Services
Office: 505-248-6284
Cell: 505-259-0335

---------- Forwarded message ---------
From: **Gilbert, Parks** <parks_gilbert@fws.gov>
Date: Thu, Sep 6, 2018 at 10:43 AM
Subject: Fwd: Skinny Administrative Record/FOIA Guidance
To: Aaron Valenta <aaron_valenta@fws.gov>, Drew Crane <drew_crane@fws.gov>, Kathleen Moynan <kathleen_moynan@fws.gov>, Krishna Gifford <krishna_gifford@fws.gov>, Laura Ragan <laura_ragan@fws.gov>, Melanie Ikenson <melanie_ruiz@fws.gov>, Michael Long <michael_long@fws.gov>, Robert Tawes <robert_tawes@fws.gov>, Sarah Backsen <sarah_backsen@fws.gov>, Timothy Merritt <timothy_merritt@fws.gov>, Barbara Hosler <barbara_hosler@fws.gov>, Justin Shoemaker <justin_shoemaker@fws.gov>, Kit Hershey <kit_hershey@fws.gov>, Russell, Daniel <daniel_russell@fws.gov>, Shawn Sartorius <shawn_sartorius@fws.gov>, Joan Goldfarb <Joan.Goldfarb@sol.doi.gov>, Benjamin Jesup <Benjamin.jesup@sol.doi.gov>, Chen, Linus <linus.chen@sol.doi.gov>, Nancy Brown-Kobil <Nancy.Brown-Kobil@sol.doi.gov>

Hey all, here is the long-awaited (at least on my branch's part) skinny AR/FOIA guidance. Please reach out with any questions.

Thanks,

Parks

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES

Falls Church, VA 22041
(703) 358-1758
parks_gilbert@fws.gov

---------- Forwarded message ---------
From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 12:37 PM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, Long, Michael <michael_long@fws.gov>, Merritt, Timothy <timothy_merritt@fws.gov>, Aubrey, Craig <craig_aubrey@fws.gov>, Frazer, Gary <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division ("ENRD") wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice ("DOJ"), which addresses the scope of the administrative record in Administrative Procedure Act ("APA") record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ's view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency's predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled "Guidance to the Federal Agencies in Compiling the Administrative Record," should be disregarded.[1] This updated guidance is specifically

[1] Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ's long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA[1] generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.[2] Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

[1] 5 U.S.C. § 552.
[2] See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.[3]

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.[4] Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.[5] See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL.*

- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.

- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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[3] "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See 383 DM 15 § 15.6.H.

[4] See *43 C.F.R. § 2.23(c)* (requiring bureaus to consult with SOL before withholding a record in full or in part).

[5] All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See 383 DM 15 § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

	CHART 1	
If	**Then**	**And**
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL
		After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.

- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.[6] The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.

- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.[7] If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.[8] Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

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[6] For example, these statutes have been found to be covered by Exemption 3.

[7] For more information on Exemption 4, see Exemption 4 in a Nutshell.

[8] This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law[9], however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.[10]

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials[11] that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

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[9] It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

[10] Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

[11] If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uniformed decisionmaking, and public confusion.[12]

- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

	CHART 2	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

[12] For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

	CHART 2 (CONT.)	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at https://www.doi.gov/foia/contacts and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	**Generally Protects this Type of Information**	**If this Exemption Applies then Conduct**
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis

Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov> Tue, Nov 7, 2017 at 7:57 AM
To: Carey Galst <Carey_Galst@fws.gov>

I'm thinking this is actually in place now, b5-DPP, b5-ACP [redacted]

Parks Gilbert
ESA Litigation Specialist
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---------- Forwarded message ---------
From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

---------- Forwarded message ---------
From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-DPP, b5-ACP [redacted]

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3 attachments

ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior's Departmental FOIA Officer, addressing the "Foreseeable Harm Standard," (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, "…injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion." The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, "…the lawyer would no longer be kept fully informed by their [*sic*] client, resulting in unsound legal advice and advocacy." Further, the foreseeable harm arising from releasing attorney work product may include, "…harm to the adversarial trial process by exposing the attorney's preparation to scrutiny." Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys' advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office's FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
    - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
    - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
    - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):

    - Draft outlines, conceptual treatments, etc.;
    - Draft inserts of language for team consideration or inclusion in policy/rule;
    - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
    - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
    - Internal comments from other Service offices and regions;
    - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
    - PowerPoints/webinars not shared with audiences external to the federal government;
    - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
    - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
    - Internal briefing documents that address pre-decisional substantive issues;
    - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.

- Categories of information and documents that are typically released in full:

    - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
    - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
    - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
- Subject lines and attachment names, unless they reveal content that reflects substantive information;
- Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
- PowerPoints/webinars that have been shared with non-federal audiences;
- Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
- Decision memoranda that reflect the final decision and rationale of the agency; and
- Final memoranda communicated to OMB Directors.

- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:

    - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
    - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
    - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

From:	Valenta, Aaron
To:	Tiffany Mcclurkin
Cc:	Jack Arnold; Larry Lee; Matthew Dekar; Robert Tawes; Timothy Merritt
Subject:	Fwd: Skinny Administrative Record/FOIA Guidance
Date:	Friday, September 7, 2018 8:35:37 AM
Attachments:	ENRD Memo - Administrative Record (October 20, 2017).pdf Foreseeable Harm Memo final_Cafaro.pdf Haugrud email.pdf 20180906_FOIA and Skinny AR guidance.docx

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Tiffany,

Not sure if you've seen this yet, but here's additional guidance on withholding deliberative or predecsional documents in FOIA requests. In particular, the last document, dated Sept 6, 2018, discusses in detail when these should be withheld. Would you be able to give us an overview of current guidance when deliberative and predecisional documents should be withheld? I haven't had a chance to look that carefully at this document, but would appreciate your insights.

Thanks,

Aaron Valenta
Chief, Division of Restoration and Recovery
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1875 Century Boulevard
Atlanta, Georgia 30345
404/679-4144

---------- Forwarded message ----------
From: **Gilbert, Parks** <parks_gilbert@fws.gov>
Date: Thu, Sep 6, 2018 at 12:43 PM
Subject: Fwd: Skinny Administrative Record/FOIA Guidance
To: Aaron Valenta <aaron_valenta@fws.gov>, Drew Crane <drew_crane@fws.gov>, Kathleen Moynan <kathleen_moynan@fws.gov>, Krishna Gifford <krishna_gifford@fws.gov>, Laura Ragan <laura_ragan@fws.gov>, Melanie Ikenson <melanie_ruiz@fws.gov>, Michael Long <michael_long@fws.gov>, Robert Tawes <robert_tawes@fws.gov>, Sarah Backsen <sarah_backsen@fws.gov>, Timothy Merritt <timothy_merritt@fws.gov>, Barbara Hosler <barbara_hosler@fws.gov>, Justin Shoemaker <justin_shoemaker@fws.gov>, Kit Hershey <kit_hershey@fws.gov>, "Russell, Daniel" <daniel_russell@fws.gov>, Shawn Sartorius <shawn_sartorius@fws.gov>, Joan Goldfarb <Joan.Goldfarb@sol.doi.gov>, Benjamin Jesup <Benjamin.jesup@sol.doi.gov>, "Chen, Linus" <linus.chen@sol.doi.gov>, Nancy Brown-Kobil <Nancy.Brown-Kobil@sol.doi.gov>

Hey all, here is the long-awaited (at least on my branch's part) skinny AR/FOIA guidance. Please reach out with any questions.

Thanks,

Parks

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---------- Forwarded message ---------
From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 12:37 PM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, Long, Michael <michael_long@fws.gov>, Merritt, Timothy <timothy_merritt@fws.gov>, Aubrey, Craig <craig_aubrey@fws.gov>, Frazer, Gary <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division ("ENRD") wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice ("DOJ"), which addresses the scope of the administrative record in Administrative Procedure Act ("APA") record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ's view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency's predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled "Guidance to the Federal Agencies in Compiling the Administrative Record," should be disregarded.[1] This updated guidance is specifically

[1] Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ's long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA[1] generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.[2] Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

[1] 5 U.S.C. § 552.
[2] See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.[3]

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.[4] Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.[5] See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL.*

- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.

- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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[3] "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See 383 DM 15 § 15.6.H.

[4] See *43 C.F.R. § 2.23(c)* (requiring bureaus to consult with SOL before withholding a record in full or in part).

[5] All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See 383 DM 15 § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

	CHART 1	
If	**Then**	**And**
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL
		After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.

- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.[6] The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.

- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.[7] If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.[8] Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

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[6] For example, these statutes have been found to be covered by Exemption 3.

[7] For more information on Exemption 4, see Exemption 4 in a Nutshell.

[8] This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law[9], however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.[10]

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials[11] that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

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[9] It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

[10] Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

[11] If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uniformed decisionmaking, and public confusion.[12]

- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

	CHART 2	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

[12] For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

	CHART 2 (CONT.)	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at https://www.doi.gov/foia/contacts and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	**Generally Protects this Type of Information**	**If this Exemption Applies then Conduct**
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis

Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov> Tue, Nov 7, 2017 at 7:57 AM
To: Carey Galst <Carey_Galst@fws.gov>

I'm thinking this is actually in place now, b5-ACC & DP [redacted]

Parks Gilbert
ESA Litigation Specialist
Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
703/358-1758
parks_gilbert@fws.gov

---------- Forwarded message ---------
From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

---------- Forwarded message ---------
From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-ACC & DP [redacted]

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

--

Linus Y. Chen, Attorney

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3 attachments

ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior's Departmental FOIA Officer, addressing the "Foreseeable Harm Standard," (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, "…injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion." The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, "…the lawyer would no longer be kept fully informed by their [*sic*] client, resulting in unsound legal advice and advocacy." Further, the foreseeable harm arising from releasing attorney work product may include, "…harm to the adversarial trial process by exposing the attorney's preparation to scrutiny." Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys' advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office's FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
    - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
    - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
    - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):

    - Draft outlines, conceptual treatments, etc.;
    - Draft inserts of language for team consideration or inclusion in policy/rule;
    - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
    - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
    - Internal comments from other Service offices and regions;
    - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
    - PowerPoints/webinars not shared with audiences external to the federal government;
    - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
    - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
    - Internal briefing documents that address pre-decisional substantive issues;
    - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.

- Categories of information and documents that are typically released in full:

    - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
    - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
    - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
- Subject lines and attachment names, unless they reveal content that reflects substantive information;
- Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
- PowerPoints/webinars that have been shared with non-federal audiences;
- Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
- Decision memoranda that reflect the final decision and rationale of the agency; and
- Final memoranda communicated to OMB Directors.

- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:

    - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
    - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
    - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

From: Lasher, Natalie
To: Iglesias, Diane
Cc: Brad Thompson
Subject: Re: Skinny Administrative Record/FOIA Guidance
Date: Friday, September 7, 2018 3:21:39 PM

Hi Brad,

I have asked Diane to join us for the next Supervisor's meeting on Tues, 11 Sep at 8:30. She will be providing the cliff notes on the latest guidance related to:

- Lifting of the Print-and-File Requirement for Preservation and Management of BisonConnect Electronic Mail (bottom line: business as usual since we don't have the local infrastructure to support/manage e-records)

- Skinny Administrative Record/FOIA Guidance (bottom line: responsive records will be examined more thoroughly)

- Compiling Contemporaneous Decision Files

After the meeting, she will send out streamlined guidance to all WFWO staff via email.

Thanks!

Natalie Lasher
Administrative Officer
Washington Fish and Wildlife Office
360-753-4328

On Fri, Sep 7, 2018 at 1:42 PM, Iglesias, Diane <diane_iglesias@fws.gov> wrote:

> Brad, this is not what I thought it was when we talked on the phone. My suggestion is to discuss this in the management meeting and distribute to all staff.
>
> Having recent experience with the Streaked Horned Lark Administrative Record, I can relate to the importance and impact of not carefully identifying records or communications within a record that are predecisional and deliberative and/or attorney-client communications or attorney work-product. Attorney-client communications and attorney-work product records were released in the 2014 CBD FOIA. Since it was released in the FOIA it was provided in the Admin Record to the plaintiffs and their attorney. We also provided a full Administrative Record instead of a skinny Administrative Record.
>
> Filing of a skinny Administrative Record is relatively new and means that it will not include deliberative materials. Hence, the importance in identifying these type of records in response to a FOIA. Sometimes ahead of a lawsuit, we will get a FOIA first. If we fail to withhold records/material we deemed would cause harm under Exemption 5 Privileges - Deliberative Process Privilege or attorney-client communications or attorney work-product in a FOIA release, Exemption 5 privileges have been waived by the Department.
>
> The guidance is primarily ESA focused but it also applies to other laws that are administered by FWS. Both the word doc and the Foreseeable Harm memo are a good overview for staff providing and reviewing records in response to a FOIA request.
>
> **What does this mean for staff**?
>
> It means a more onerous review of responsive records to a FOIA request to identify predecisional

and deliberative material (Deliberative Process Privilege under FOIA exemption 5) and attorney-client communications and attorney work-product (also Exemption 5 Privileges), and then to consider the foreseeable harm in releasing it.

Staff can be thoughtful in their naming convention of records to help identify potential FOIA exempted material in their file naming convention/subject lines in emails and/or grouping of records.

****

Diane Iglesias
Government Information Specialist
U.S. Fish and Wildlife Service
510 Desmond Dr., SE, Suite 102
Lacey, WA 98503
360-753-4373/Fax 360-753-9405

****

On Thu, Sep 6, 2018 at 10:41 AM Thompson, Brad <brad_thompson@fws.gov> wrote:

> Hi Diane,
>
> Please see below and attached for new guidance. Please provide me with a suggestion for how to disseminate to the entire office.
>
> Thanks,
> Brad
>
> ---------- Forwarded message ----------
> From: **White, Rollie** <rollie_white@fws.gov>
> Date: Thu, Sep 6, 2018 at 10:23 AM
> Subject: Fwd: Skinny Administrative Record/FOIA Guidance
> To: FW1 ES FWO Assignment Contacts <fw1esfwoassignmentcontacts@fws.gov>, FW1 RO ES Employees <fw1roesemployees@fws.gov>
> Cc: Rachel Merkel <rachel_merkel@fws.gov>, John DeClerck <john_declerck@fws.gov>
>
> Please share with appropriate staff.
>
> Rollie White
> Assistant Regional Director - Ecological Services
> Pacific Region, USFWS
> 911 NE 11th Ave.
> Portland, OR 97232
> Office: (503) 231-6151
> Cell: (503) 839-2872

Rollie_White@fws.gov

---------- Forwarded message ----------
From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 9:37 AM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, "Long, Michael" <michael_long@fws.gov>, "Merritt, Timothy" <timothy_merritt@fws.gov>, "Aubrey, Craig" <craig_aubrey@fws.gov>, "Frazer, Gary" <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163

--
Brad Thompson, Ph.D
Acting State Supervisor
Washington Fish and Wildlife Office
US Fish and Wildlife Service
510 Desmond Drive SE
Lacey, WA 98503
360-753-4652
(360) 790-8187 (cell)

From: Harke, Eileen
To: Natalie Lasher; Diane Iglesias
Subject: Compiling Contemporaneous Decision Files - DTS#068090
Date: Friday, September 7, 2018 3:23:02 PM
Attachments: 068090 Signed Memorandum w attachments.pdf

Natalie -

I was thinking as we were talking that there was one more document you might need to consider as you evaluate the impact of the Print to File email from yesterday and the Skinny AR guidance that impacts how we consider deliberative process. There is one more document you may not have seen yet, which is attached, addressing Decision Files. Just this week I asked both the FOIA and Records Officers to do some outreach on this as it has been clear to me that this really hasn't reached the target audience yet.

Just something else for you to consider.

~~~~~~~~~~~~~~~~~~~~~~~~~~

Eileen Harke, CRM and ERM[M]
Government Information Specialist
Branch of Listing Policy and Support, Division of Conservation and Classification
5275 Leesburg Pike
Falls Church, VA 22041-3803
eileen_harke@fws.gov
703-358-2096
~~~~~~~~~~~~~~~~~~~~~~~~~~

United States Department of the Interior

FISH AND WILDLIFE SERVICE

MAY 1 1 2018

In Reply Refer To:
FWS/AES/DAES/DER/068090

Memorandum

To: Service Directorate

From: Principal Deputy Director

Subject: Compiling Contemporaneous Decision Files

This memorandum provides direction regarding the contemporaneous compilation of Decision Files to document Agency review and decision making pursuant to the National Environmental Policy Act (NEPA; April 27, 2018, Deputy Secretary's memorandum). These procedures apply to Decision Files for Agency decisions other than notice-and-comment rulemaking, which have their own prescribed processes.

In accordance with 282 FW 5, *Compiling a Decision File and an Administrative Record*, all Service programs will adhere to the following standardized process as outlined in the policy. Managers are to establish a program manager, project manager or designated staff member who will assist in coordinating and consulting with other people in the Service and the Department to gather responsive information related to the development of a decision.
All files are to be reviewed (including electronic files) related to the decision and decision-making process.

Compilation of decisional files should be a proactive part of our decision-making process; not just a reactive response to a FOIA or litigation. Compiling decisional files as the records are being created ensures a complete and accessible record. To facilitate this process, staff should use labels in Bison Connect e-mail and utilize designated locations for electronic and paper documents related to a particular decision. As staff compile the records associated with each Agency decision, they should refer the annual FISSA+ and records management guidance to determine which files should be considered a record and maintained as part of the decisional file for this particular Agency decision.

To ensure the Service collects all responsive documents, the program lead may request an Enterprise eArchive System (EES) Audit Request. For further information, contact Service Records Officer, Ms. Teri Jackson-Hicks at teri_jackson-hicks@fws.gov or phone (703) 358-2257.

We will continue to work with the Division of Information Resources and Technology Management to streamline the process and update applicable policies.

Attachments

THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

APR 2 7 2018

Memorandum

To: Assistant Secretaries
Heads of Bureaus and Offices
NEPA Practitioners

From: Deputy Secretary

Subject: Compiling Contemporaneous Decision Files

Purpose:

This Memorandum provides direction regarding the contemporaneous compilation of Decision Files to document Agency review and decision making pursuant to the National Environmental Policy Act (NEPA) and other applicable requirements.[1]

Background:

On August 31, 2017, I issued Secretary's Order 3355 (Order) to immediately improve the Department of the Interior's (Department) NEPA process. In the course of implementing that Order, it has come to my attention that some Bureaus do not compile Decision Files contemporaneously with the development of Agency decisions. This yields a need to invest significant time and resources later if the Bureau is asked to compile records before or following a decision.

The Department has multiple responsibilities for the maintenance and disclosure of Federal records. For purposes of this Memorandum, document compilation responsibilities fall into three general categories that often intersect, including: (1) records management governed by 44 U.S.C. Chapters 29 and 31; (2) the Freedom of Information Act (FOIA);[2] and (3) preparation of Administrative Records for litigation.

A Decision File is a contemporaneous record of the Agency's decision-making process. Practically, the Decision File is a collection of documents maintained by a designated employee who is generally the project's program manager, the project manager, or staff who has access to the relevant documents that detail the development of an Agency's decision. Compilation of a Decision File should flow from an already established practice within the Bureaus and Offices to comply with the Federal Records Act (FRA).[3]

---

[1] These procedures apply to Decision Files for Agency decisions other than notice-and-comment rulemaking, which have their own proscribed processes.
[2] 5 U.S.C. § 552.
[3] 44 U.S.C. § 31 et seq.

The FRA dictates the need to document, and preserve evidence of, Agency decisions. It requires the head of each Federal Agency to make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the Agency for the purpose of furnishing the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the Agency's activities.[4] By adhering to the FRA, Bureaus and Offices will find themselves well placed to create a Decision File in real time.

If the decision is subjected to judicial review, the Decision File will be used as the primary basis for compilation of the Administrative Record to be submitted to a court. This Memorandum does *not* address the standards for compiling an Administrative Record, which may be a subset of the Decision File document or, in some cases, could be broader. The Decision File may also serve as the primary compilation of documents that may be responsive to a FOIA or other records request, although additional document gathering may be needed depending upon the nature of the request.

Directives:

1. No later than May 11, 2018, each Bureau shall issue direction requiring contemporaneous compilation of Decision Files for decision-making processes that will or could result in a "final Agency action" subject to challenge under the Administrative Procedure Act.[5] Each Bureau shall further establish a system for standardized Decision File tracking to comply with this Memorandum and that comports with the needs of the Office of the Solicitor, the Office of Environmental Policy and Compliance, and the Office of the Chief Information Officer.

2. The Decision File should:

    - Contain the complete story of the Agency decision-making process, including options considered and rejected by the Agency;
    - Include important substantive information that was presented to, relied on, or reasonably available to the decision maker;
    - Establish that the Agency complied with relevant statutory, regulatory, and Agency requirements; and
    - Demonstrate that the Agency followed a reasoned decision-making process.

3. Bureaus and Offices have wide latitude to create and maintain Decision Files, but the following general guidelines should be followed:

[4] 44 U.S.C. § 3101.
[5] 5 U.S.C. § 704.

- The Office of the Solicitor should be consulted throughout the process as necessary;

- A Decision File should be created once consideration of a proposal, application, request, or decision begins, which will vary based on the situation;

- The Decision File should serve as a single organized source of information that records the Agency decision and decision-making process;

- As a routine matter, the Decision Files should capture information from employees who are involved in the decision-making process prior to those employees leaving such roles;

- The Decision File should be kept in an accessible location and should be organized in a logical manner, such as chronologically or by topic—or even chronologically within each topic—so that documents can be added to the Decision File as they are generated or received;

- To the extent documents may be subject to a privilege, they should be so marked to the extent practicable during the decision-making process;

- All documents placed in the Decision File should be appropriately labeled and dated;

- Substantive meetings that are relevant to the decision-making process should be sufficiently documented;

- Drafts that help substantiate the Agency's decision-making process should be included in the Decision File;

- Documentation of electronic information (such as that found on websites) and communications (such as emails) should be maintained in the Decision File only if relevant, substantive, and if it documents the decision-making process;

- When information contained on websites is relied on, the Decision File should contain a contemporaneous copy of the website, including the address and date it was downloaded, to ensure that the information relied on is preserved before the website content changes;

- Contemporaneous memoranda that document relevant oral communications, serve to explain otherwise confusing emails, or that document other matters that demonstrate the Agency's decision-making process should be written or collected and placed in the Decision File before the final decision is reached; and

- Once the decision maker has made a final decision, the Decision File should be closed.

4. Bureaus and Offices are directed to provide a copy of the direction referenced in section 3 – paragraph 1 to the Office of the Deputy Secretary at nepa.depsec@ios.doi.gov no later than May 15, 2018.

Effective Date:

Directives and guidance within this Memorandum are effective immediately upon distribution.

282 FW 5

Compiling a Decision File and an Administrative Record

Supersedes Director's Order 158, 09/04/03
Date: March 2, 2007
Series: Records Management
Part 282: Records Management Program
Originating Office: Division of Policy and Directives Management

PDF Version

5.1 What is the purpose of this chapter? This chapter steps down and supplements the Department of the Interior's guidance for compiling decision files and administrative records.

5.2 What is the scope of this chapter? All Service employees who are responsible for Service decisions and establishing an administrative record must follow the guidance in Exhibit 1, Memorandum from the Department of the Interior Office of the Solicitor to the Director, Standardized Guidance on Compiling a Decision File and an Administrative Record, June 27, 2006.

5.3 What is the authority for this chapter? The authority for this chapter is the Administrative Procedure Act (5 U.S.C. 552).

5.4 What is a decision file and why is it important?

A. A decision file:

(1) Is compiled and maintained by an employee during the decisionmaking process. Typically, the employee who compiles the file is the program manager, project manager, or a designated staff member who has access to the relevant documents used to make and detail the development of a decision.

(2) Contains the complete "story" of our decisionmaking process.

(3) Includes important, substantive information that people involved in the decision used, relied on, or that was reasonably available or presented to them when making the decision.

(4) Makes it easier for employees to compile the administrative record if we need to do so.

(5) Establishes that we complied with relevant statutory, regulatory, and agency requirements.

(6) Demonstrates that we followed a reasoned, decisionmaking process.

(7) May also be called a case, action, agency, official, or issue file.

B. Following are examples of a few, but not all, actions for which employees should keep decision files:

(1) Permit decisions.

(2) Listing and critical habitat decisions.

(3) Drafting and amending regulations.

(4) Policy decisions.

(5) Freedom of Information Act requests.

(6) Adverse personnel actions.

(7) Land acquisition decisions.

5.5 What is an administrative record?

A. If a Service decision is challenged in court, the court may ask us to provide an administrative record.

B. We must begin to prepare the administrative record by using the decision file.

C. The administrative record:

(1) Is the paper trail that documents the Service's decisionmaking process and the basis for any final Service decision.

(2) Is the documentation used to support Service decisions and to reveal the reason for both the decision and the decisionmaking process.

(3) Documents not only the decisions and involvement of employees, but also the decisions of contractors and involvement by outside parties related to Service decisionmaking.

5.6 Why is an administrative record important? These are the records that a judge reviews to determine if our final decision is legally sufficient and supportable. An incomplete record may:

A. Improperly or incorrectly skew our final decision about an issue,

B. Invite litigation after the decision,

C. Affect our ability to defend the decision if we are challenged in court, and

D. Call into question accuracy of the decision and the decisionmaking process.

5.7 How does the Service determine what documents to include in the administrative record? We:

A. Follow the guidance in Exhibit 1. The guidance gives specific examples of what to include in the record.

B. Work with the Solicitors Office to determine what statutes and regulations apply to the administrative record. Though the Administrative Procedure Act generally applies to all Service decisionmaking, there may be specific records requirements in authorizing statutes that also impact the process. You should become familiar with the records requirements in any statute that affects the

decision that your administrative record documents. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and the Clean Air Act (42 U.S.C. 7607) both have specific records requirements for decisions made under those statutes.

C. Coordinate and consult with other people in the Service and the Department. If asked to prepare an administrative record, contact all other Service and Department employees involved in the decisionmaking process and ask them to search all files (including electronic files) related to the decision and decisionmaking process, including, but not limited to:

(1) Central program files,

(2) Working files kept at their desks,

(3) Calendars,

(4) Documents they received as courtesy copies,

(5) Handwritten notes,

(6) Electronic mail, and

(7) Any other record of electronic communications related to the decision.

5.8 What types of records should be in the administrative record?

A. All records (see section 5.7C) that people involved in the decision used or that were available to them when they were making the decision.

B. Records that relate to the substance or procedure of making the decision (see pages 6-7 of Exhibit 1 for examples).

C. All pertinent records regardless of whether they favor the decision that we made, favor alternatives other than the decision made, or express criticism of the decision. Never withhold records just because they may not support the decision.

5.9 May Service employees remove pertinent records from the administrative record? No, employees must include all records related to the decisionmaking process. Before submitting the administrative record to a court and after getting approval from the Office of the Solicitor and the Department of Justice attorney assigned to the case, the Service or Regional Records Officer may remove or redact records on the basis of privilege.

A. The removal or redaction of records on the basis of a privilege may be challenged, and the court may determine whether the removal or redaction is appropriate (for example, a judge may perform an ‘in camera’ or ‘in chambers’ inspection in his or her office to determine if the records should be removed or redacted).

B. The Service or Regional Records Officer or Regional Solicitor must document the removal or redaction of records**.** Attach a list of any records removed or redacted on the basis of privilege. At a minimum, the list should include:

(1) Document number,

(2) The name of the document and a brief description,

(3) Number of pages

(4) Author(s),

(5) Date, and

(6) Privilege (if one is claimed).

5.10 What types of records are generally not included in the administrative record? We generally do not include (also see Exhibit 1, pages 8-10):

A. Records that are not relevant to the decisionmaking process, such as fax cover sheets (unless the fax cover sheets, for example, contain substantive (opinions/actions) related to the decisionmaking).

B. Documents that were not in our possession at the time we made the decision.

C. Electronic communications, including emails, that do not contain factual information or information that documents the decisionmaking process.

D. Personal notes, journals, and appointment calendars maintained solely for personal use and not circulated to colleagues or added to the agency file.

E. Drafts of documents where the differences among them reflect minor editing changes. Minor editing changes are changes that do not substantively affect the meaning, decision, or intent of any record that is part of the decisionmaking process. However, you must include drafts that have hand-written notes showing the evolving decisionmaking process.

5.11 Who certifies the administrative record? The certifier signs a statement, under penalty of perjury, swearing to the authenticity and completeness of the record (see Appendix 3 of the Department's guidance in Exhibit 1). The Service Records Officer certifies the administrative record for Headquarters programs involved in litigation. For programs involved in litigation in the Regions, the Regional Records Officer or the employee who is most familiar with how we prepared the administrative record certifies the record. Employees may contact the Service Records Officer with questions about who should certify the record for cases in their Regions.

5.12 What is required for the certification of the administrative record presented to the court? Those doing the review and certification of the administrative record should be given adequate time to review the record. The program should provide the following to the person certifying the administrative record for the court:

A. A copy of all individual records that compose the administrative record.

B. A copy of the index of the administrative record.

C. A list of any documents withheld on the basis of privilege or removed because they are not pertinent to the record (see section 5.9B).

5.13 What is the potential outcome of an improperly prepared administrative record? As mentioned in section 5.6, in the event of litigation an incomplete administrative record may cause the court to grant a plaintiff's motion to supplement the record and/or overturn the Service's decision. The court may do so for the following reasons:

A. The record does not adequately explain our action.

B. There is evidence that we failed to consider all relevant material.

C. We considered evidence that we did not include in the record.

D. The case is very complex and the court needs additional information to understand the decision.

E. The case involves a failure to take action.

F. The case involves a preliminary injunction where the court may relieve the plaintiff from some action or penalty because the record does not support it.

5.14 Who should Service employees contact if they have questions? If you have a question about administrative record requirements, contact the Service Records Officer, the Solicitor's Office that serves your Region, or your Regional Litigation Coordinator.

For information on the content of this chapter, contact the Service Records Officer in the Division of Policy and Directives Management (PDM). For more information about this Website, contact Krista Holloway in PDM at Krista_Holloway@fws.gov.

From: Gilbert, Parks
To: Chen, Linus
Subject: Re: [EXTERNAL] Re: Skinny Administrative Record/FOIA Guidance
Date: Friday, September 7, 2018 3:33:14 PM

Good to know - thanks

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
(703) 358-1758
parks_gilbert@fws.gov

On Fri, Sep 7, 2018 at 3:27 PM Chen, Linus <linus.chen@sol.doi.gov> wrote:

> FYI-
>
> ---------- Forwarded message ---------
> From: **Daniel Pollak - NOAA GC** <daniel.pollak@noaa.gov>
> Date: Fri, Sep 7, 2018 at 3:25 PM
> Subject: [EXTERNAL] Re: Skinny Administrative Record/FOIA Guidance
> To: Linus Chen <linus.chen@sol.doi.gov>
>
> p.s. we haven't finalized anything analogous at this point, so I don't right now have anything I can share on this.
>
> On Fri, Sep 7, 2018 at 8:53 AM Daniel Pollak - NOAA GC <daniel.pollak@noaa.gov> wrote:
>
> > Thanks Linus
> >
> > On Thu, Sep 6, 2018 at 2:54 PM Chen, Linus <linus.chen@sol.doi.gov> wrote:
> >
> > > Hi Dan,
> > > FWS just distributed their guidance on applying the deliberative process privilege in FOIA responses. As I believe NOAA is trying to determine how to respond to the DOJ memo on Administrative Records, we thought this may be of help. FWS requests that NOAA GC keep a close hold of this, and not to distribute it. If you have anything you can share with FWS on your end, it would be greatly appreciated.
> > > Thanks,
> > > Linus
> > >
> > > ---------- Forwarded message ---------
> > > From: **Gilbert, Parks** <parks_gilbert@fws.gov>
> > > Date: Thu, Sep 6, 2018 at 12:43 PM
> > > Subject: Fwd: Skinny Administrative Record/FOIA Guidance
> > >
> > > Hey all, here is the long-awaited (at least on my branch's part) skinny AR/FOIA guidance. Please reach out with any questions.

Thanks,

Parks

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
(703) 358-1758
parks_gilbert@fws.gov

---------- Forwarded message ---------
From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 12:37 PM
Subject: Skinny Administrative Record/FOIA GuidanceH

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

--
Daniel Pollak, Attorney Advisor
NOAA Office of General Counsel

United States Department of Commerce
Silver Spring, MD
daniel.pollak@noaa.gov
(301) 628-1616

--

Daniel Pollak, Attorney Advisor
NOAA Office of General Counsel
United States Department of Commerce
Silver Spring, MD
daniel.pollak@noaa.gov
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--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

From: Gilbert, Parks
To: Carey Galst
Subject: skinny AR / FOIA and NOAA GC
Date: Friday, September 7, 2018 3:35:20 PM

So Linus did share the guidance with NOAA GC (Dan Pollak) and asked if they had anything similar if they would share it with us. Dan said they didn't have anything currently, just FYI.

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
(703) 358-1758
parks_gilbert@fws.gov

From: Cummins, Stacey
To: Jennifer Sturdivant
Cc: Norman, Kate; Clint Riley
Subject: Re: FW: Skinny Administrative Record/FOIA Guidance
Date: Monday, September 10, 2018 1:31:06 PM

This is HQ ES guidance. It did not go out to all the programs, it only went to ES.

Stacey Cummins
FOIA Coordinator/Records Manager
USFWS Mountain Prairie Region
134 Union Blvd.
Lakewood, CO 80228
303-236-4473

On Mon, Sep 10, 2018 at 1:25 PM Jennifer Sturdivant <JENNIFER_STURDIVANT@fws.gov> wrote:

> Why are the processes different when we're all following HQ guidance?
>
> **From:** Cummins, Stacey <stacey_cummins@fws.gov>
> **Sent:** Monday, September 10, 2018 1:22 PM
> **To:** Jennifer Sturdivant <JENNIFER_STURDIVANT@fws.gov>
> **Cc:** Norman, Kate <kate_norman@fws.gov>; Clint Riley <clint_riley@fws.gov>
> **Subject:** Re: FW: Skinny Administrative Record/FOIA Guidance
>
> OK...in the future, it would be nice to loop me in on these things as I now have one process for ES and a totally different process for all the other programs.
>
> Stacey Cummins
>
> FOIA Coordinator/Records Manager
> USFWS Mountain Prairie Region
> 134 Union Blvd.
> Lakewood, CO 80228
> 303-236-4473
>
> On Mon, Sep 10, 2018 at 1:18 PM Jennifer Sturdivant

<JENNIFER_STURDIVANT@fws.gov> wrote:

> The content Nathan referenced was in response to these documents. The highlighted portion Nathan forwarded was the entire email sent to the PLs and ES staff from Kate. She and I had some questions which prompted us to reach out and receive additional guidance from HQ.
>
> **From:** Cummins, Stacey <stacey_cummins@fws.gov>
> **Sent:** Monday, September 10, 2018 12:43 PM
> **To:** Jennifer Sturdivant <JENNIFER_STURDIVANT@fws.gov>
> **Cc:** Norman, Kate <kate_norman@fws.gov>; Clint Riley <clint_riley@fws.gov>
> **Subject:** Re: FW: Skinny Administrative Record/FOIA Guidance
>
> Is this what was forwarded to the field offices? The content that was in the email Nathan referenced is not in any of these documents.
>
> Thanks,
>
> Stacey Cummins
>
> FOIA Coordinator/Records Manager
> USFWS Mountain Prairie Region
> 134 Union Blvd.
> Lakewood, CO 80228
> 303-236-4473

On Mon, Sep 10, 2018 at 12:24 PM Jennifer Sturdivant <JENNIFER_STURDIVANT@fws.gov> wrote:

> Hello,
>
> In reference to your email dated 9-8-18 where you requested information regarding the "skinny record", here's the original email that was sent. Please let me know if you have any questions.
>
> **From:** Nelson, Marjorie <marjorie_nelson@fws.gov>
> **Sent:** Thursday, September 6, 2018 11:08 AM
> **To:** Kate Norman <Kate_Norman@fws.gov>; Jennifer Sturdivant

<jennifer_sturdivant@fws.gov>
Subject: Fwd: Skinny Administrative Record/FOIA Guidance

I haven't read this nor do I know if this is being covered in the ES chief call now.

Marjorie Nelson

Chief, Division of Ecological Services

Mountain-Prairie Region
U.S. Fish and Wildlife Service

303-236-4258 direct

720-582-3524 cell

---------- Forwarded message ----------
From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 10:37 AM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, "Long, Michael" <michael_long@fws.gov>, "Merritt, Timothy" <timothy_merritt@fws.gov>, "Aubrey, Craig" <craig_aubrey@fws.gov>, "Frazer, Gary" <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey

Division Chief for Conservation and Classification

U.S. Fish and Wildlife Service

(703) 358-2163

From:	Arnold, Jack
To:	Tiffany Mcclurkin
Cc:	Aaron Valenta; Larry Lee; Matthew Dekar; Robert Tawes; Timothy Merritt; Leopoldo Miranda
Subject:	Re: Skinny Administrative Record/FOIA Guidance
Date:	Tuesday, September 11, 2018 12:16:14 PM
Attachments:	20180906_FOIA and Skinny AR guidance.docx ENRD Memo - Administrative Record (October 20, 2017).pdf Foreseeable Harm Memo final_Cafaro.pdf Haugrud email.pdf

---

Thanks all. As stated in Bridget Fahey's note, this applies to most ES actions subject to litigation and includes actions in Tim's, Aaron's, and Rob's shops. We need to send this out to everyone for their awareness and use/action, but I want to make sure we have our ducks in a row, and know what we may want to add to this before sending it out - so I appreciate your review and input Tiffany. Please let us know when you've had a chance to review, and if you have any additional insights that we should include when we send guidance out to our folks. We can then prepare something to go out to the Project Leaders to share with their staff (thinking from either Leo or me).... Adding Leo here for his awareness as well.

- Jack

Jack Arnold
Deputy Assistant Regional Director - Ecological Services
U.S. Fish and Wildlife Service
1875 Century Blvd.
Atlanta, GA 30345
404-679-7311 office
404-679-7081 fax
703-789-5620 cell

On Fri, Sep 7, 2018 at 9:16 AM, Tiffany Mcclurkin <tiffany_mcclurkin@fws.gov> wrote:

> Thanks so much Aaron!
>
> I agree with you 100%. We definitely need consistency and to all be on the same page.
>
> V/R
>
> Tiffany McClurkin
>
> Government Information Specialist

Freedom of Information Act (FOIA) Coordinator

U.S. Fish & Wildlife Service

Southeast Region (Region 4)

1875 Century Blvd, Suite 218

Atlanta GA 30345

(O) (404) 679-4104

(E) tiffany_mcclurkin@fws.gov

From: Valenta, Aaron <aaron_valenta@fws.gov>
Sent: Friday, September 7, 2018 9:07 AM
To: Tiffany Mcclurkin <tiffany_mcclurkin@fws.gov>
Cc: Jack Arnold <jack_arnold@fws.gov>; Larry Lee <larry_lee@fws.gov>; Matthew Dekar <matthew_dekar@fws.gov>; Robert Tawes <robert_tawes@fws.gov>; Timothy Merritt <timothy_merritt@fws.gov>
Subject: Re: Skinny Administrative Record/FOIA Guidance

Tiffany,

Absolutely! Next week, or the week after would be fine. I just want to make sure we all have the same understanding of what will/will not be withheld and the criteria to be used.

Thanks,

Aaron Valenta

Chief, Division of Restoration and Recovery

U.S. Fish and Wildlife Service

1875 Century Boulevard

Atlanta, Georgia 30345

404/679-4144

This email correspondence and any attachments to and from this sender is subject to the Freedom of Information Act and may be disclosed to third parties.

On Fri, Sep 7, 2018 at 8:52 AM, Tiffany Mcclurkin <tiffany_mcclurkin@fws.gov> wrote:

> Good Morning Aaron,
>
> I'm in receipt of your email. If you don't mind, can I respond early next week when I have an opportunity to review all of the attached documents? I'm in the middle of reviewing documents for a litigation in addition to entering FOIAs and trying to get as many prepared and closed before the end of the FY. Your help with this will be greatly appreciated. Thanks!
>
> V/R
>
> Tiffany McClurkin
>
> Government Information Specialist
>
> Freedom of Information Act (FOIA) Coordinator
>
> U.S. Fish & Wildlife Service
>
> Southeast Region (Region 4)
>
> 1875 Century Blvd, Suite 218
>
> Atlanta GA 30345
>
> (O) (404) 679-4104
>
> (E) tiffany_mcclurkin@fws.gov
>
> **From:** Valenta, Aaron <aaron_valenta@fws.gov>
> **Sent:** Friday, September 7, 2018 8:35 AM
> **To:** Tiffany Mcclurkin <tiffany_mcclurkin@fws.gov>
> **Cc:** Jack Arnold <Jack_Arnold@fws.gov>; Larry Lee <larry_lee@fws.gov>; Matthew Dekar <matthew_dekar@fws.gov>; Robert Tawes <robert_tawes@fws.gov>; Timothy Merritt

<timothy_merritt@fws.gov>
Subject: Fwd: Skinny Administrative Record/FOIA Guidance

Tiffany,

Not sure if you've seen this yet, but here's additional guidance on withholding deliberative or predecsional documents in FOIA requests. In particular, the last document, dated Sept 6, 2018, discusses in detail when these should be withheld. Would you be able to give us an overview of current guidance when deliberative and predecisional documents should be withheld? I haven't had a chance to look that carefully at this document, but would appreciate your insights.

Thanks,

Aaron Valenta

Chief, Division of Restoration and Recovery

U.S. Fish and Wildlife Service

1875 Century Boulevard

Atlanta, Georgia 30345

404/679-4144

---------- Forwarded message ----------
From: **Gilbert, Parks** <parks_gilbert@fws.gov>
Date: Thu, Sep 6, 2018 at 12:43 PM
Subject: Fwd: Skinny Administrative Record/FOIA Guidance
To: Aaron Valenta <aaron_valenta@fws.gov>, Drew Crane <drew_crane@fws.gov>, Kathleen Moynan <kathleen_moynan@fws.gov>, Krishna Gifford <krishna_gifford@fws.gov>, Laura Ragan <laura_ragan@fws.gov>, Melanie Ikenson <melanie_ruiz@fws.gov>, Michael Long <michael_long@fws.gov>, Robert Tawes <robert_tawes@fws.gov>, Sarah Backsen <sarah_backsen@fws.gov>, Timothy Merritt <timothy_merritt@fws.gov>, Barbara Hosler <barbara_hosler@fws.gov>, Justin Shoemaker <justin_shoemaker@fws.gov>, Kit Hershey <kit_hershey@fws.gov>,

"Russell, Daniel" <daniel_russell@fws.gov>, Shawn Sartorius <shawn_sartorius@fws.gov>, Joan Goldfarb <Joan.Goldfarb@sol.doi.gov>, Benjamin Jesup <Benjamin.jesup@sol.doi.gov>, "Chen, Linus" <linus.chen@sol.doi.gov>, Nancy Brown-Kobil <Nancy.Brown-Kobil@sol.doi.gov>

Hey all, here is the long-awaited (at least on my branch's part) skinny AR/FOIA guidance. Please reach out with any questions.

Thanks,

Parks

Parks Gilbert

Endangered Species Act Litigation Specialist

U.S. Fish and Wildlife Service

5275 Leesburg Pike, MS:ES

Falls Church, VA 22041

(703) 358-1758

parks_gilbert@fws.gov

---------- Forwarded message ---------
From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 12:37 PM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, Long, Michael <michael_long@fws.gov>, Merritt, Timothy <timothy_merritt@fws.gov>, Aubrey, Craig <craig_aubrey@fws.gov>, Frazer, Gary <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey

Division Chief for Conservation and Classification

U.S. Fish and Wildlife Service

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Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior's Departmental FOIA Officer, addressing the "Foreseeable Harm Standard," (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, "…injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion." The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, "…the lawyer would no longer be kept fully informed by their [*sic*] client, resulting in unsound legal advice and advocacy." Further, the foreseeable harm arising from releasing attorney work product may include, "…harm to the adversarial trial process by exposing the attorney's preparation to scrutiny." Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys' advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office's FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
    - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
    - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
    - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):

    - Draft outlines, conceptual treatments, etc.;
    - Draft inserts of language for team consideration or inclusion in policy/rule;
    - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
    - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
    - Internal comments from other Service offices and regions;
    - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
    - PowerPoints/webinars not shared with audiences external to the federal government;
    - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
    - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
    - Internal briefing documents that address pre-decisional substantive issues;
    - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.

- Categories of information and documents that are typically released in full:

    - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
    - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
    - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
- Subject lines and attachment names, unless they reveal content that reflects substantive information;
- Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
- PowerPoints/webinars that have been shared with non-federal audiences;
- Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
- Decision memoranda that reflect the final decision and rationale of the agency; and
- Final memoranda communicated to OMB Directors.

- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:

    - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
    - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
    - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
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Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division ("ENRD") wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice ("DOJ"), which addresses the scope of the administrative record in Administrative Procedure Act ("APA") record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ's view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency's predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled "Guidance to the Federal Agencies in Compiling the Administrative Record," should be disregarded.[1] This updated guidance is specifically

[1] Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ's long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA[1] generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.[2] Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

[1] 5 U.S.C. § 552.
[2] See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.[3]

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.[4] Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.[5] See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL.*

- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.

- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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[3] "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See 383 DM 15 § 15.6.H.

[4] See *43 C.F.R. § 2.23(c)* (requiring bureaus to consult with SOL before withholding a record in full or in part).

[5] All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See 383 DM 15 § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

	CHART 1	
If	**Then**	**And**
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL
		After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.

- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.[6] The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.

- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.[7] If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.[8] Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

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[6] For example, these statutes have been found to be covered by Exemption 3.

[7] For more information on Exemption 4, see Exemption 4 in a Nutshell.

[8] This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law[9], however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.[10]

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials[11] that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

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[9] It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

[10] Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

[11] If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uniformed decisionmaking, and public confusion.[12]

- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

	CHART 2	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

[12] For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

	CHART 2 (CONT.)	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at https://www.doi.gov/foia/contacts and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	**Generally Protects this Type of Information**	**If this Exemption Applies then Conduct**
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis

Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov> Tue, Nov 7, 2017 at 7:57 AM
To: Carey Galst <Carey_Galst@fws.gov>

I'm thinking this is actually in place now, b5-ACC & DP [redacted]

Parks Gilbert
ESA Litigation Specialist
Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
703/358-1758
parks_gilbert@fws.gov

---------- Forwarded message ---------
From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

---------- Forwarded message ---------
From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-ACC & DP [redacted]

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

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3 attachments

ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K

From: Lasher, Natalie
To: Iglesias, Diane
Subject: Re: Skinny Administrative Record/FOIA Guidance
Date: Tuesday, September 11, 2018 2:47:27 PM

Thank you Diane!

Natalie Lasher
Administrative Officer
Washington Fish and Wildlife Office
360-753-4328

On Tue, Sep 11, 2018 at 1:32 PM, Iglesias, Diane <diane_iglesias@fws.gov> wrote:

> Hi all,
>
> This is another subject discussed with supervisors today. It is more pertinent to some than others. The reason for the guidance stems from the new direction last fall in regards to filing a skinny administrative record (AR) rather than a full AR to the court. A Skinny AR doesn't include deliberative material. This new direction may negatively be impacted if we release deliberative information in a FOIA. The attached word doc, Guidance for Applying Deliberative Process Privilege in processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records, provides guidance on applying the Deliberative Process privilege and additional FOIA Exemption 5 privileges. The Foreseeable Harm Standard memo is a supporting document to the word document. Both are being provided to make you aware of the new guidance. Both should be reviewed again if involved in responding to a FOIA.
>
> We will post both documents to our Intranet site as well.
>
> Please touch base with me or your supervisor if you have any questions.
>
> **********
> Diane Iglesias
> Government Information Specialist
> U.S. Fish and Wildlife Service
> 510 Desmond Dr., SE, Suite 102
> Lacey, WA 98503
> 360-753-4373/Fax 360-753-9405
> **********
>
> ---------- Forwarded message ---------
> From: **Thompson, Brad** <brad_thompson@fws.gov>
> Date: Thu, Sep 6, 2018 at 10:41 AM
> Subject: Fwd: Skinny Administrative Record/FOIA Guidance
> To: Diane Iglesias <diane_iglesias@fws.gov>
> Cc: Natalie Lasher <natalie_lasher@fws.gov>

Hi Diane,

Please see below and attached for new guidance. Please provide me with a suggestion for how to disseminate to the entire office.

Thanks,
Brad

---------- Forwarded message ----------
From: **White, Rollie** <rollie_white@fws.gov>
Date: Thu, Sep 6, 2018 at 10:23 AM
Subject: Fwd: Skinny Administrative Record/FOIA Guidance
To: FW1 ES FWO Assignment Contacts <fw1esfwoassignmentcontacts@fws.gov>, FW1 RO ES Employees <fw1roesemployees@fws.gov>
Cc: Rachel Merkel <rachel_merkel@fws.gov>, John DeClerck <john_declerck@fws.gov>

Please share with appropriate staff.

Rollie White
Assistant Regional Director - Ecological Services
Pacific Region, USFWS
911 NE 11th Ave.
Portland, OR 97232
Office: (503) 231-6151
Cell: (503) 839-2872

Rollie_White@fws.gov

---------- Forwarded message ----------
From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 9:37 AM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, "Long, Michael" <michael_long@fws.gov>, "Merritt, Timothy" <timothy_merritt@fws.gov>, "Aubrey, Craig" <craig_aubrey@fws.gov>, "Frazer, Gary" <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA

Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163

--
Brad Thompson, Ph.D
Acting State Supervisor
Washington Fish and Wildlife Office
US Fish and Wildlife Service
510 Desmond Drive SE
Lacey, WA 98503
360-753-4652
(360) 790-8187 (cell)

From: Cummins, Stacey
To: Carrie Hyde-Michaels
Subject: Fwd: FW: Skinny Administrative Record/FOIA Guidance
Date: Wednesday, September 12, 2018 9:43:17 AM
Attachments: ENRD Memo - Administrative Record (October 20, 2017).pdf
Foreseeable Harm Memo final_Cafaro.pdf
Haugrud email.pdf
20180906_FOIA and Skinny AR guidance.docx

Hi, Carrie-
I was wondering if you could send something out to all the FOIA coordinators about the attached. I learned of this from the Wyoming Field Office because Kate Norman, Jennifer's supervisor, had forwarded it to the project leaders. Her email sort of addressed the harm, but it made it sound like we can just withhold everything, without addressing the harm for each document.

The other thing I wanted to bring up about this (DOJ skinny record) is I b5-DPP [redacted]

Thanks,

Stacey Cummins
FOIA Coordinator/Records Manager
USFWS Mountain Prairie Region
134 Union Blvd.
Lakewood, CO 80228
303-236-4473

---------- Forwarded message ---------
From: **Jennifer Sturdivant** <JENNIFER_STURDIVANT@fws.gov>
Date: Mon, Sep 10, 2018 at 12:24 PM
Subject: FW: Skinny Administrative Record/FOIA Guidance
To: Stacey Cummins <stacey_cummins@fws.gov>
Cc: Kate Norman <kate_norman@fws.gov>, Clint Riley <clint_riley@fws.gov>

Hello,

In reference to your email dated 9-8-18 where you requested information regarding the "skinny record", here's the original email that was sent. Please let me know if you have any questions.

From: Nelson, Marjorie <marjorie_nelson@fws.gov>
Sent: Thursday, September 6, 2018 11:08 AM
To: Kate Norman <Kate_Norman@fws.gov>; Jennifer Sturdivant <jennifer_sturdivant@fws.gov>
Subject: Fwd: Skinny Administrative Record/FOIA Guidance

I haven't read this nor do I know if this is being covered in the ES chief call now.

Marjorie Nelson

Chief, Division of Ecological Services

Mountain-Prairie Region
U.S. Fish and Wildlife Service

303-236-4258 direct

720-582-3524 cell

---------- Forwarded message ----------
From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 10:37 AM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, "Long, Michael" <michael_long@fws.gov>, "Merritt, Timothy" <timothy_merritt@fws.gov>, "Aubrey, Craig" <craig_aubrey@fws.gov>, "Frazer, Gary" <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing

Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey

Division Chief for Conservation and Classification

U.S. Fish and Wildlife Service

(703) 358-2163

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division ("ENRD") wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice ("DOJ"), which addresses the scope of the administrative record in Administrative Procedure Act ("APA") record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ's view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency's predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled "Guidance to the Federal Agencies in Compiling the Administrative Record," should be disregarded.[1] This updated guidance is specifically

[1] Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ's long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA[1] generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.[2] Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

[1] 5 U.S.C. § 552.
[2] See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.[3]

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.[4] Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.[5] See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL.*

- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.

- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

---

[3] "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See 383 DM 15 § 15.6.H.

[4] See *43 C.F.R. § 2.23(c)* (requiring bureaus to consult with SOL before withholding a record in full or in part).

[5] All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See 383 DM 15 § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

	CHART 1	
If	**Then**	**And**
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL
		After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.

- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.[6] The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.

- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.[7] If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.[8] Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

---

[6] For example, these statutes have been found to be covered by Exemption 3.

[7] For more information on Exemption 4, see Exemption 4 in a Nutshell.

[8] This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law[9], however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.[10]

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials[11] that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

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[9] It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

[10] Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

[11] If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uniformed decisionmaking, and public confusion.[12]

- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

	CHART 2	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

[12] For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

	CHART 2 (CONT.)	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at https://www.doi.gov/foia/contacts and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	**Generally Protects this Type of Information**	**If this Exemption Applies then Conduct**
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis

Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov> Tue, Nov 7, 2017 at 7:57 AM
To: Carey Galst <Carey_Galst@fws.gov>

I'm thinking this is actually in place now b5-ACC & DP [redacted]

Parks Gilbert
ESA Litigation Specialist
Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
703/358-1758
parks_gilbert@fws.gov

---------- Forwarded message ---------
From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

---------- Forwarded message ---------
From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-ACC & DP [redacted]

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

--

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3 attachments

ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior's Departmental FOIA Officer, addressing the "Foreseeable Harm Standard," (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, "…injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion." The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, "…the lawyer would no longer be kept fully informed by their [*sic*] client, resulting in unsound legal advice and advocacy." Further, the foreseeable harm arising from releasing attorney work product may include, "…harm to the adversarial trial process by exposing the attorney's preparation to scrutiny." Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys' advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office's FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
    - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
    - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
    - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):

    - Draft outlines, conceptual treatments, etc.;
    - Draft inserts of language for team consideration or inclusion in policy/rule;
    - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
    - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
    - Internal comments from other Service offices and regions;
    - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
    - PowerPoints/webinars not shared with audiences external to the federal government;
    - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
    - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
    - Internal briefing documents that address pre-decisional substantive issues;
    - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.

- Categories of information and documents that are typically released in full:

    - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
    - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
    - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
- Subject lines and attachment names, unless they reveal content that reflects substantive information;
- Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
- PowerPoints/webinars that have been shared with non-federal audiences;
- Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
- Decision memoranda that reflect the final decision and rationale of the agency; and
- Final memoranda communicated to OMB Directors.

- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:

    - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
    - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
    - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

From: Cummins, Stacey
To: Cathy Willis
Subject: Fwd: FW: Skinny Administrative Record/FOIA Guidance
Date: Wednesday, September 12, 2018 9:54:32 AM
Attachments: ENRD Memo - Administrative Record (October 20, 2017).pdf
Foreseeable Harm Memo final_Cafaro.pdf
Haugrud email.pdf
20180906_FOIA and Skinny AR guidance.docx

Cathy-
Here's what was sent to ES. I asked Carrie Hyde-Michaels if she could send to all FOIA coordinators so we are aware. b5-DPP [redacted]

Oh...and I also asked Clint if we can have a meeting with Kate and Mike and/or Nicole to discuss what role Jennifer is supposed to be playing in FOIA, in light of the below and email sent by Kate to the field stations.

Stacey Cummins
FOIA Coordinator/Records Manager
USFWS Mountain Prairie Region
134 Union Blvd.
Lakewood, CO 80228
303-236-4473

---------- Forwarded message ---------
From: **Jennifer Sturdivant** <JENNIFER_STURDIVANT@fws.gov>
Date: Mon, Sep 10, 2018 at 12:24 PM
Subject: FW: Skinny Administrative Record/FOIA Guidance
To: Stacey Cummins <stacey_cummins@fws.gov>
Cc: Kate Norman <kate_norman@fws.gov>, Clint Riley <clint_riley@fws.gov>

Hello,

In reference to your email dated 9-8-18 where you requested information regarding the "skinny record", here's the original email that was sent. Please let me know if you have any questions.

From: Nelson, Marjorie <marjorie_nelson@fws.gov>
Sent: Thursday, September 6, 2018 11:08 AM
To: Kate Norman <Kate_Norman@fws.gov>; Jennifer Sturdivant <jennifer_sturdivant@fws.gov>
Subject: Fwd: Skinny Administrative Record/FOIA Guidance

I haven't read this nor do I know if this is being covered in the ES chief call now.

Marjorie Nelson

Chief, Division of Ecological Services

Mountain-Prairie Region
U.S. Fish and Wildlife Service

303-236-4258 direct

720-582-3524 cell

---------- Forwarded message ----------
From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 10:37 AM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, "Long, Michael" <michael_long@fws.gov>, "Merritt, Timothy" <timothy_merritt@fws.gov>, "Aubrey, Craig" <craig_aubrey@fws.gov>, "Frazer, Gary" <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey

Division Chief for Conservation and Classification

U.S. Fish and Wildlife Service

(703) 358-2163

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division ("ENRD") wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice ("DOJ"), which addresses the scope of the administrative record in Administrative Procedure Act ("APA") record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ's view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency's predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled "Guidance to the Federal Agencies in Compiling the Administrative Record," should be disregarded.[1] This updated guidance is specifically

[1] Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ's long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA[1] generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.[2] Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

[1] 5 U.S.C. § 552.
[2] See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.[3]

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.[4] Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.[5] See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL.*

- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.

- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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[3] "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See 383 DM 15 § 15.6.H.

[4] See *43 C.F.R. § 2.23(c)* (requiring bureaus to consult with SOL before withholding a record in full or in part).

[5] All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See 383 DM 15 § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

	CHART 1	
If	**Then**	**And**
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL
		After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.

- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.[6] The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.

- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.[7] If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.[8] Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

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[6] For example, these statutes have been found to be covered by Exemption 3.

[7] For more information on Exemption 4, see Exemption 4 in a Nutshell.

[8] This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law[9], however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.[10]

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials[11] that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

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[9] It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

[10] Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

[11] If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uniformed decisionmaking, and public confusion.[12]

- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

	CHART 2	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

[12] For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

	CHART 2 (CONT.)	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at https://www.doi.gov/foia/contacts and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	**Generally Protects this Type of Information**	**If this Exemption Applies then Conduct**
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis

Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov> Tue, Nov 7, 2017 at 7:57 AM
To: Carey Galst <Carey_Galst@fws.gov>

I'm thinking this is actually in place now, b5-ACC & DP [redacted]

Parks Gilbert
ESA Litigation Specialist
Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
703/358-1758
parks_gilbert@fws.gov

---------- Forwarded message ---------
From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

---------- Forwarded message ---------
From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-ACC & DP [redacted]

--

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3 attachments

ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior's Departmental FOIA Officer, addressing the "Foreseeable Harm Standard," (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, "…injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion." The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, "…the lawyer would no longer be kept fully informed by their [*sic*] client, resulting in unsound legal advice and advocacy." Further, the foreseeable harm arising from releasing attorney work product may include, "…harm to the adversarial trial process by exposing the attorney's preparation to scrutiny." Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys' advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office's FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
    - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
    - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
    - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):

    - Draft outlines, conceptual treatments, etc.;
    - Draft inserts of language for team consideration or inclusion in policy/rule;
    - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
    - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
    - Internal comments from other Service offices and regions;
    - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
    - PowerPoints/webinars not shared with audiences external to the federal government;
    - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
    - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
    - Internal briefing documents that address pre-decisional substantive issues;
    - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.

- Categories of information and documents that are typically released in full:

    - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
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- Subject lines and attachment names, unless they reveal content that reflects substantive information;
- Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
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- Decision memoranda that reflect the final decision and rationale of the agency; and
- Final memoranda communicated to OMB Directors.

- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:

    - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
    - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
    - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

FOIA: Frequently Asked Questions

PART ONE: SEARCHING FOR INFORMATION:

Q: What is FOIA?
A: The Freedom of Information Act (FOIA) is a law allowing access to records held by the U.S. federal government. The goals when it was enacted were: informed citizens, accountability, transparency.

Q: Who can make a FOIA request?
A: "Any person" – regardless of citizenship – has a right to obtain access to federal agency records, including U.S. citizens, prisoners, corporations, associations, foreign nationals, foreign governments, state and local governments, etc.
Exceptions:

- Fugitives from Justice, if records are related
- Foreign governments requesting information from intelligence agencies

Q: What is a valid FOIA request?
A: A FOIA request is valid ("perfected") when it reasonably describes the records sought, there are no outstanding fee issues, and the request was submitted in writing. A request must also be for documents, not just information – we only deal in documents, we do not create records or answer questions.

Q: What is a responsive record?
A: The FOIA applies to agency records, which are records the bureau has created or obtained and that are under the bureau's possession and control at the time a request is received. If a record is located in an agency file, the presumption is that the record is an agency record.
Exception:

- a personal record created only for personal convenience, never shared with anyone, kept separate from agency files, and not used to conduct agency business

Q: Are records just emails?
Agency records can be maintained in any format, including: books, papers, maps, charts, plats, plans, architectural drawings, photographs, microfilm, machine-readable materials such as magnetic tape and disks, electronic records (for example, e-mail messages, audiovisual material such as still pictures, sound and video recordings.

Q: What cut-off dates should I use for my search?
A: If a requester has specified a timeframe (e.g., January 1, 2016 to December 31, 2016) we must use those dates. If they have asked for an open ended time period (e.g., January 1, 2016 to present), then our cut-off date will be the date the search begins. This is why it is very important to begin to search in a timely manner. If we delay beginning our search, the universe of responsive documents may continue to grow.

Q: What is a reasonable search?
A: Our search must be reasonably calculated to uncover all responsive documents. We are only required to do a reasonable search, not an exhaustive search. We must follow a reasonable interpretation of the scope of the request and search all reasonable locations, including the files of those individuals most likely to have documents, using keywords and search terms that are likely to retrieve responsive documents.

Q: How long do I have to respond?
A: The statutory time frame is 20 days from the date the request is perfected (scope is clear and fee issues are settled). We can take a 10 day extension with written notice in unusual circumstances (search of separate facilities; voluminous request; consult with another agency/component required).

In practice, we may not be able to finish processing our response within that timeframe, so we process requests in the order in which they are received within the processing track assigned when the request is first acknowledged.

The processing tracks are:

- Simple: 1-5 workdays
- Normal: 6-20 workdays
- Complex: 21-60 workdays
- Exceptional/Voluminous: >60 workdays
- Expedited Processing: requests will be processed as soon as practicable

Q: They're asking for too much, this will take forever, why don't you tell them we can't do this?
A: If a search will be voluminous, we can discuss with the requester whether they would like to narrow their scope. It is easier to discuss narrowing if you do a preliminary search to give us real data to discuss (e.g., "10 employees worked on this and a search of one of their emails produced 5,000 results, so a search of all email may produce 50,000+ results"). Requesters are not required to narrow their requests.

Q: But this is sensitive, we can't release this! I don't have to turn it over, right?
A: There are multiple steps in processing FOIA - search, review, redaction, and release. We must search for all responsive records in our possession and turn them over for review. Upon review, we may add redactions or determine that a record must be withheld in full. After review is complete, redacted records may be released to the reqeuster.

PART TWO: REDACTING INFORMATION

Q: What did the FOIA Improvement Act change?
A: The FOIA Improvement Act was signed into law June 30, 2016. A full Department of Justice summary of all changes is available at: https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016

Some of the highlights are:

- Agencies must notify requesters of dispute resolution services available to them in determination letters
- Requesters must have at least 90 days to file an appeal
- Codifies "rule of three": If records have been requested three or more times, the agency must post them electronically
- Codifies "foreseeable harm" standard: Agencies "shall withhold information" under the FOIA only if the agency reasonably foresees that disclosure would harm an interested protected by an exemption" or "disclosure is prohibited by law"
- Agencies shall "take reasonable steps necessary to segregate and release nonexempt information"
- Deliberative process privilege only applies to records for 25 years

Q: What is foreseeable harm?
A: We can only withhold records or portions of records if there is a foreseeable harm in their release. Mere "speculative or abstract fears" are not a sufficient basis for withholding. If in doubt, err on the side of openness.

Some things to think about when we are considering the foreseeable harm:

- Is there ongoing litigation on this issue?
- Could release confuse the public?
- Could release have a chilling effect on people's willingness to voice their opinions when discussing similar matters in the future?

Q: This is just a draft, so I can withhold in full, right?
A: We are required to review every document; nothing is automatically withheld. We have a duty to reasonably segregate information, meaning where an exemption may apply, we have an obligation to segregate and release non-exempt information from the same document.

Q: What can we withhold?
A: For ES records, the two most frequently used exemptions are Exemption 5 and 6, but there are actually 9 FOIA exemptions:

- Exemption 1: protects properly classified information.
- Exemption 2: protects records "related solely to the internal personnel rules and practices of an agency."
- Exemption 3: protects information that has been "specifically exempted from disclosure by statute."
- Exemption 4: protects commercial or financial information obtained from a person that is privileged or confidential; and trade secrets.
- Exemption 5: protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."
- Exemption 6: protects information in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy.
- Exemption 7: protects information created or compiled for law enforcement purposes.
- Exemption 8: protects matters contained in or related to examination, operating, or condition reports prepared by or for regulators or supervisors of financial institutions.
- Exemption 9: protects geological and geophysical information and data, including maps, concerning wells.

Q: When can we consider using Exemption 5?
A: Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

First, we have to determine whether we meet the inter- or intra-agency test. This can mean the document was maintained within one agency or shared between two agencies. It can also have been shared with neutral consultants.

If we have shared the information outside of the government, we cannot apply Exemption 5.

Q: What are the three privileges Exemption 5 protects?
A: Deliberative Process Privilege, Attorney-Client Privilege, and Attorney Work Product.

- Deliberative Process Privilege: protects predecisional, deliberative, legal or policy matters. Facts generally not protected. Under the FOIA Improvement Act, DPP is no longer available after 25 years.

- Attorney-Client Privilege: protects confidential communication between client and attorney. ACP does not necessarily apply on every email chain with a SOL email address cc'd. There is no time limit.

- Attorney Work Product: protects documents prepared by an attorney or under his/her direction, in anticipation of litigation. Facts are protected and there is no time limit.

Q: How does Exemption 6 work?
A: Exemption 6 protects information in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy

We must engage in a balancing test. In order to withhold information, the privacy interest must outweigh the public interest.

- Privacy Interest: individuals have a privacy interest in not having agencies disseminate personal information about them.
- Public interest: serves FOIA "core purpose" of shedding light on agency's operations or activities

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior's Departmental FOIA Officer, addressing the "Foreseeable Harm Standard," (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, "…injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion." The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, "…the lawyer would no longer be kept fully informed by their [*sic*] client, resulting in unsound legal advice and advocacy." Further, the foreseeable harm arising from releasing attorney work product may include, "…harm to the adversarial trial process by exposing the attorney's preparation to scrutiny." Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys' advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office's FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
    - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
    - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
    - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):

    - Draft outlines, conceptual treatments, etc.;
    - Draft inserts of language for team consideration or inclusion in policy/rule;
    - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
    - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
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For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

From: O"Hara, Kerry
To: Lord, Kenneth; Susan (Amanda) Bossie; Michael Stevens; Art Kleven; Benjamin Jesup; Cheryll Dobson; Dana Jacobsen; Dave Rothstein; Gobeski, Elizabeth A; Frank Lupo; Wilson, Frank; Geoffrey Painter; Hannah Bolt; Helen Speights; Jeffrey Bernstein; Jennifer Rigg; Joan Goldfarb; John Austin; Justin Tade; Kathryn Williams-shuck; Kelly Bakayza; Kimberly Gilmore; Larry Mellinger; Lea Tyhach; Linus Chen; Lori Caramanian; Lynn Long; Martin Steinmetz; Michael Schoessler; Nada Naseri; Nancy Brown-Kobil; Peg Romanik; Philip Kline; Rebecca Finley; Russell Husen; Sharon Pudwill; Stephen Mahoney; Steve Barcley; Steven Scordino; Stuart Radde; Tony Sullins; Tyson Powell; Veronica Rowan; Vicki Mott; Carmen Thomas; Miller, Luke; Kerry O"Hara
Cc: Bridget Fahey; Carey Galst; Parks Gilbert; Sarah Quamme
Subject: Re: ESA monthly call next Thursday, September 20 2:00 p.m. EDT
Date: Wednesday, September 19, 2018 4:44:24 PM
Attachments: SO 3368.pdf
inc take guidance 2018-04.pdf
FOIA and Skinny AR guidance 20180906 .docx
Recovery Plan case summaries.docx

All:

For our call on Thursday, September 20, 2018, 2:00 p.m. EDT, 11:00 a.m. PDT

Call in number - b5-CIP
Leader Code - b5-CIP (Sacramento will initiate for this month)
Participant Code - b5-CIP

Agenda:

b5-ACC & DP

4) FOIA and SKinny Record Guidance Document (attached) - Parks Gilbert
b5-ACC & DP

Next Call and organizer - Thursday, October 18, moving east.

Talk to you all tomorrow.

On Fri, Sep 14, 2018 at 7:07 AM, O'Hara, Kerry <kerry.o'hara@sol.doi.gov> wrote:

> All
>
> Our Monthly ESA call is scheduled for next Thursday, September 20 at 2:00 p.m. EDT; 11:00 a.m. PDT.
>
> Please send me any items for the agenda. Thank you.
>
> --
> Kerry O'Hara
> Assistant Regional Solicitor
> DOI Office of the Solicitor - Pacific Southwest Region
> 2800 Cottage Way, E-1712
> Sacramento, CA 95825

(916) 978-6132
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THE SECRETARY OF THE INTERIOR
WASHINGTON

ORDER NO. 3368

Subject: Promoting Transparency and Accountability in Consent Decrees and Settlement Agreements

Sec. 1 **Purpose.** This Order is intended to promote transparency and accountability in consent decrees and settlements entered into on behalf of the Department of the Interior (Department) and better ensure that the Department's views regarding such agreements and settlements reflect the scope of the Department's authority and the public interest.

Sec. 2 **Authorities.** This Order is issued under the authority of Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), as amended, as well as other relevant statutes.

Sec. 3 **Background.** In recent years, the Department supported entering a number of consent decrees and settlement agreements, including some with significant implications for the policies and priorities of the Department. Between January 1, 2012 and January 19, 2017, the Department agreed to enter into over 460 settlement agreements and consent decrees (an average of over 90 per year), and agreed to pay more than $4.4 billion in monetary awards. From January 1, 2016 through January 19, 2017, the Department entered into approximately 96 settlement agreements or consent decrees, agreeing to pay more than $1.7 billion in monetary awards.

In many cases, entering a consent decree or settlement agreement may be a prudent use of taxpayer resources to avoid costly and drawn out litigation that the Department is likely to lose. However, concerns have been raised with respect to various Federal Agencies that the litigation process has been used to undermine the procedural safeguards Congress put in place to ensure that the public has input in policymaking, particularly through a practice referred to as "sue and settle."

This Order is intended to alleviate those concerns by giving the public notice of litigation, settlement agreements, and consent decrees involving the Department. In addition, it provides a process for public input before the Department recommends approving a settlement with certain long-term policy implications or large budgetary commitments.

Sec. 4 **Implementation.** Consistent with governing laws and regulations, as well as principles of transparency and accountability, I direct the following actions:

a. With respect to procedural transparency:

(1) Within 30 days, the Office of the Solicitor shall work with the Office of the Chief Information Officer to establish a publicly accessible "Litigation" webpage that is prominently linked to the Office of the Solicitor's homepage.

(2) Within 90 days, the Office of the Solicitor shall compile and the Office of the Chief Information Officer shall post, on the Litigation page, a searchable list of final judicial and administrative consent decrees and settlement agreements (consent decrees and settlement agreements) that continue to govern Departmental actions (including those of any Bureau or Office thereof), including a brief summary of each decree or agreement, a note of any attorney fees or costs paid, and a link to the text of the decree or agreement.

(3) Within 15 days of receiving service of a complaint or petition for review regarding a law, regulation, or rule that names the Department, any Bureau or Office thereof, and/or any person acting in their official capacity as an employee thereof as a defendant or respondent in Federal court, the Office of the Solicitor shall:

(a) Directly notify any State(s) or Tribe(s) upon which the complaint or petition would have a substantial direct effect through the relevant Office of the Attorney General of any State or Principal Elected Tribal Official (e.g., Chairman, President) of any Federally recognized Tribal nation, respectively. No notification is required under this section where the relevant State or Tribe is a party to the action; and

(b) Working with the Office of the Chief Information Officer, publicly post the following information on the Litigation page:

(i) Names of the parties;

(ii) Case number;

(iii) Date filed;

(iv) Court the complaint was filed in; and

(v) Statutory and/or regulatory provisions at issue.

(4) The Office of the Solicitor shall compile and the Office of the Chief Information Officer shall post, at the top of the Litigation page, any proposed consent decree or settlement agreement that commits the Department to seek a particular appropriation or budget authorization from Congress or formally reprogram appropriated funds, and/or places obligations on the Department that extends beyond 5 years. The Office of the Solicitor shall publish a notice of the proposed consent decree or settlement agreement in the Federal Register, and provide a public comment period of at least 30 days. The notice shall include explanations for the following:

(a) Statutory basis for the proposed consent decree or settlement agreement.

(b) Relevant terms of the proposed consent decree or settlement agreement, including a description of the specific obligations imposed upon the Department and a general breakdown of the monetary terms, including any payment of costs or attorney fees;

(c) A summary of why the proposed settlement agreement or consent decree is in the public interest; and

(d) The Department's timeline for meeting the obligations set forth therein.

(5) The Department shall provide the Department of Justice a summary of the comments received prior to or simultaneous with a formal recommendation or opinion regarding the proposed consent decree or settlement.

(6) Within 15 days of executing a consent decree or settlement agreement, the Office of the Solicitor, with the assistance of the Office of the Chief Information Officer, shall add a brief summary and link to the text of the decree or agreement to the searchable list posted on the Litigation page. Simultaneously, the decree or agreement, including any maps, charts, or other images, will be made available to the public in the Reading Room of the Department of the Interior Library.

b. With respect to ensuring that consent decrees and settlement agreements are consistent with the public interest and the limitations set by Congress, the Department, including any Bureau or Office thereof, will not recommend that the Department of Justice enter into a consent decree or settlement agreement that:

(1) Converts into a mandatory duty the otherwise discretionary authority of the Secretary of the Interior (Secretary) and/or his designees (including Bureau and Office heads) to revise, amend, or promulgate regulations; or interferes with the Secretary and/or his designees' (including bureau and office heads) authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act.

(2) Commits the Department or any of its Bureaus and Offices thereof to expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

(3) Requires the Department or any subdivision thereof to pay attorney fees and costs unless the plaintiff or petitioner has established a strong likelihood of obtaining such fees under the law; or

(4) Prohibits public disclosure of any consent decree or settlement agreement, except to the extent necessary to protect proprietary information, such as trade secrets, or otherwise mandated by law.

c. The following limitations and exceptions shall apply:

(1) Notwithstanding the above, this Order shall not apply to consent decrees or settlement agreements intended to resolve personnel matters, tort claims, or contract disputes, including, but not limited to, bid protests.

(2) Nothing in this Order shall be deemed to supersede any applicable provision of law or judicial decree, including those mandating confidentiality.

(3) The requirements of this Order may be waived, in whole or in part, upon a written determination by the Secretary, Deputy Secretary, or Solicitor that doing so is in the best interest of the Department and is consistent with the Department's statutory authority, sound principles of democratic accountability, and constitutional separation of powers. Within 15 days, any waiver (with appropriate redactions) shall be posted on the Litigation page.

Sec. 5 **Effect of the Order**. This Order is intended to improve the internal management of the Department. This Order and any resulting reports or recommendations are not intended to, and do not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person. To the extent there is any inconsistency between the provision of this Order and any Federal laws or regulations, the laws or regulations will control.

Sec. 6 **Expiration Date**. This Order is effective immediately. It will remain in effect until its provisions are implemented and completed, or until it is amended, superseded, or revoked.

Deputy Secretary

Date: SEP 11 2018

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

In Reply Refer To:
FWS/AES/067974

APR 2 6 2018

Memorandum

To: Regional Directors 1-8

From: Principal Deputy Director

Subject: Guidance on trigger for an incidental take permit under section 10 (a)(1)(B) of the Endangered Species Act where occupied habitat or potentially occupied habitat is being modified.

The U.S. Fish and Wildlife Service (Service) Field and Regional personnel often provide critical technical assistance to private parties who may take actions affecting listed species, and who may decide to invest significant resources to prepare an incidental take permit application pursuant to ESA Section 10(a)(1)(B). It is vital that Service staff apply correct and consistent interpretations of ESA statutory and regulatory provisions.

It is also vital that Service staff recognize that whether to apply for a section 10(a)(1)(B) permit is a decision of the applicant. Service staff can and should advise non-federal parties on the law, our regulations and guidance, and the potential for take of listed species incidental to their activities, but it is not appropriate to use mandatory language (e.g., a permit is "required") in the course of that communication. The HCP process is applicant driven, and that includes the threshold determination of whether to develop an HCP and apply for a permit. That threshold determination ultimately rests with the project proponent. Project proponents can take Service input into account and proceed in a number of ways, based upon their own risk assessment. They may proceed (at their own risk) as planned without a permit, modify their project and proceed without a permit, or prepare and submit a permit application. The biological, legal, and economic risk assessment regarding whether to seek a permit belongs with the private party determining how to proceed[1].

After consultation with the Solicitor's Office, I am providing guidance on how one determines whether a project is likely to result in "take" of a listed species as it relates to habitat modification. Further, I am requiring that : 1) the Assistant Director – Ecological Services post this memorandum and the attached questionnaire on the Headquarters Endangered Species web page; and 2) that Service regional and field staff include direction to that web site

[1] However, once a project proponent has decided to apply for a permit, the structure and scope of the HCP and associated permit are subject to negotiation between the permittee and the Service.

(www.fws.gov/endangered/esa-library/pdf/Guidance-on-When-to-Seek-an-Incidental-Take-Permit.pdf) when project proponents seek information about whether their action needs an incidental take permit under section 10 (a)(1)(B). By operating in a consistent manner, with clear standards, we can reduce conflict, minimize public frustration and increase government efficiency.

Simply put, as set out below, a section 10 (a)(1)(B) incidental take permit is only needed in situations where a non-federal project is likely to result in "take" of a listed species of fish or wildlife. That is, the requirement for an incidental take permit, as set forth in section 10 (a)(1)(B) of the ESA and its accompanying regulations, is only activated when non-Federal activities are likely to result in the take of listed wildlife.[2] As discussed in more detail below, habitat modification, in and of itself, does not necessarily constitute take. Chapter 3 of the Fish and Wildlife Service's Habitat Conservation Plan Handbook (Handbook) sets out the pre-application process and plainly states that if take is not anticipated then an incidental take permit is not needed. Further, it explains that an incidental take permit is only needed if a non-federal party's activity is "in an area where ESA-listed species are known to occur and where their activity or activities are reasonably certain to result in incidental take." The Handbook clarifies that the standard for determining if activities are likely to result in incidental take is whether that take is "reasonably certain to occur." In addition, the Handbook directs that the Service should avoid "processing applications submitted purely 'as insurance' when take of ESA –listed species is not anticipated." (*See Handbook, Chapter 3 "Phase 1:Pre-Application")*

An essential component of analysis needed to determine whether an incidental take permit (ITP) is needed is an understanding of what constitutes take under the ESA. The ESA defines "take" as: to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct. 16 U.S. C. 1542(b). The ESA's take definition has been supplemented by the Service with regulatory definitions of the terms "harm" and "harass".

The terms "harm" and "harass" have been redefined several times. In July 1975, the Service proposed "harass" to be defined as an act that "either actually or potentially harms wildlife by killing or injuring it, or by annoying it to such an extent as to cause serious disruption in essential behavior patterns, such as feeding, breeding, or sheltering. Significant environment modification or degradation which has such effects is included in the meaning of harass." 40 F.R. 28712 (July 8, 1975). After notice and comment on the proposed definition, the Service reworked the definition of harass (as well as the definition of harm) and redefined the Service's regulatory definition of "harass" as follows: "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding feeding or sheltering." 50 C.F.R. §17.3.

[2] Listed plants are not included in the ESA's prohibition on take of listed species.

The preamble to the final rule explicitly stated that the Service moved the concept of environmental modification or degradation from "harass" to the term "harm." 40 F.R. 44412 (Sept. 26, 1975). Specifically, the preamble explained that the "concept of environmental damage being considered a 'taking' has been retained, but it now found in a new definition of 'harm.'" In addition, the Service chose to modify the definition of "harass" by "restricting its application to acts or omissions which are done 'intentionally or negligently.'" The preamble explained that this change – to have "harass" only apply to intentional or negligent actions – was made as otherwise under the proposed language, harass would have "applied to any action, regardless of intent or negligence." Harass, therefore, is not a form of take permitted under section 10(a)(1)(B), which applies to taking "incidental to, but not the purpose of, the carrying out of an otherwise lawful activity."

Take in the form of "harm" is particularly significant and relevant to section 10 ITPs because it can be manifested in the form of habitat modification, a common component of non-Federal activities. As discussed above, the term "harm" has also been redefined several times, always with the intention to clarify that "harm" relates to activities that are likely to result in the actual death or injury of listed species. In 1975, the Secretary issued a regulation that defined "harm" to mean an act that "actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavior patterns, which include but are not limited to, breeding, feeding or sheltering," and which include "significant environmental modification or degradation which has such effects." This regulation's preamble noted that "harm" was "expressly limited to those actions causing actual death or injury to a protected species of fish and/or wildlife. The actual consequences of such an action upon a listed species is paramount." *See*, 40 F.R. 44,413 (Sept. 26, 1975).

In 1981, the Secretary established the current regulatory definition of "harm" because of concerns that the prior regulatory definition was being interpreted to bar habitat modification even when there was no resulting injury to species. The regulatory definition of "harm" was modified to read: "Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering." 50 C.F.R. §17.3. Some commenters on the rule asserted that habitat modification alone could be a "take" under section 9; the Service's response in the preamble was that "in the opinion of the Service Congress expressed no such intent." Further, the preamble explained that the use of the word "actually" clarifies that a "standard of actual adverse effects applies to section 9 taking" and that it was clear that "habitat modification or degradation, standing alone, is not a taking pursuant to section 9." It went on to emphasize that "modification must be *significant*, must *significantly impair essential* behavior patterns, and must result in *actual* injury" (emphasis in original). Finally, the preamble discussed the specific choice to use the word "impair" rather than "disrupt" in the phrase "significantly impair essential behavior patterns" to "limit harm to situations where a behavioral pattern was adversely affected

and not simply disturbed on a temporary basis with no consequent injury to the protected species." *See*, 46 FR 54,748 (Nov. 4, 1981).

The validity of the regulatory definition of "harm" as applied to habitat modification faced a facial challenge, which eventually reached the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities For a Greater Oregon*, 515 U.S. 687, 115 S. Ct. 2407 (1995). The Supreme Court upheld the regulatory definition of "harm" and emphasized that while "harm" could result from habitat modification "every term in the regulation's definition of 'harm' is subservient to the phrase 'an act which actually kills or injures.'"

After the Supreme Court's decision, the 9th Circuit also analyzed the definition of "harm" and agreed that harming a species may be indirectly caused by habitat modification but concluded that habitat modification in and of itself does not constitute harm unless it "actually kills or injures wildlife." *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 1999). The *Bernal* court highlighted the Supreme Court's emphasis that every term in the definition of harm is "subservient to the phrase 'an act which actually kills or injures wildlife.'" In a later case, the 9th Circuit again tackled the definition of "harm" and held that, while the harm could be prospective, the "mere potential for harm, however, is insufficient."[3] *Arizona Cattle Growers' Association v. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir.2001). The *Arizona Cattle Growers'* Court opined that without evidence that a take would likely occur, a finding of take based on habitat modification alone would impose conditions on otherwise lawful use of land and such an action by the Service would be arbitrary and capricious.

The law is clear, then, that in order to find that habitat modification constitutes a taking of listed species under the definition of "harm", all aspects of the harm definition must be triggered. The questions that should be asked before a determination is made that an action involving habitat modification is likely to result in take are:

1. Is the modification of habitat significant?
2. If so, does that modification also significantly impair an essential behavior pattern of a listed species?
3. And, is the significant modification of the habitat, with a significant impairment of an essential behavior pattern, likely to result in the actual killing or injury of wildlife?

All three components of the definition are necessary to meet the regulatory definition of "harm" as a form of take through habitat modification under section 9, with the "actual killing or injury of wildlife" as the most significant component of the definition.

In summary, potential applicants should be advised that an ITP is only needed when an activity (or the results of the activity) is likely to result in the take of listed wildlife and that it is the

[3] The impact on a species may be prospective but it still must hit all the components of the definition of "harm" and must be reasonably certain to occur.

potential applicant's decision whether to apply for an ITP. If an applicant seeks technical assistance from the Service, a careful examination of what constitutes take (using guidance from this document, the attached questionnaire, and the HCP Handbook) should be central to the discussion as to whether an ITP is needed. Further, it should be noted that habitat modification, in and of itself, does not constitute take unless all three components of the definition of "harm" are met.

Please ensure that each non-Federal party who seeks information about a section 10(a)(1)(B) permit is directed to this memorandum and questionnaire as posted on the Service's Endangered Species webpage (www.fws.gov/endangered/esa-library/pdf/Guidance-on-When-to-Seek-an-Incidental-Take-Permit.pdf).

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior's Departmental FOIA Officer, addressing the "Foreseeable Harm Standard," (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, "…injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion." The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, "…the lawyer would no longer be kept fully informed by their [*sic*] client, resulting in unsound legal advice and advocacy." Further, the foreseeable harm arising from releasing attorney work product may include, "…harm to the adversarial trial process by exposing the attorney's preparation to scrutiny." Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys' advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office's FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
    - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
    - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
    - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):

    - Draft outlines, conceptual treatments, etc.;
    - Draft inserts of language for team consideration or inclusion in policy/rule;
    - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
    - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
    - Internal comments from other Service offices and regions;
    - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
    - PowerPoints/webinars not shared with audiences external to the federal government;
    - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
    - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
    - Internal briefing documents that address pre-decisional substantive issues;
    - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.

- Categories of information and documents that are typically released in full:

    - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
    - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
    - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
- Subject lines and attachment names, unless they reveal content that reflects substantive information;
- Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
- PowerPoints/webinars that have been shared with non-federal audiences;
- Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
- Decision memoranda that reflect the final decision and rationale of the agency; and
- Final memoranda communicated to OMB Directors.

- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:

    - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
    - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
    - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.